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CLERK.

Supreme Court of the United States

October Term, 1918.

No. 277.

THE PUBLIC UTILITIES COMMISSION FOR THE STATE OF KANSAS ET AL.,
Appellants,

vs.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS
COMPANY, ET AL.

Filed September 20, 1917.

No. 329.

KANSAS CITY, MISSOURI; THE PUBLIC SERVICE COMMISSION OF THE
STATE OF MISSOURI, ET AL., *Appellants,*

vs.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS
COMPANY, ET AL.

Filed January 10, 1918.

No. 320.

KANSAS CITY GAS COMPANY, THE WYANDOTTE COUNTY GAS
COMPANY, ET AL., *Appellants,*

vs.

KANSAS NATURAL GAS COMPANY, JOHN M. LANDON AND GEORGE F.
SHARITT, RECEIVERS, AND FIDELITY TITLE AND TRUST COMPANY.

Filed January 14, 1918.

No. 383.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS ET AL.,
Appellants,

vs.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS
COMPANY, ET AL.

Filed February 6, 1919.

*Appeals from the District Court of the United States for the
District of Kansas.*

MOTION TO DISMISS THE APPEALS

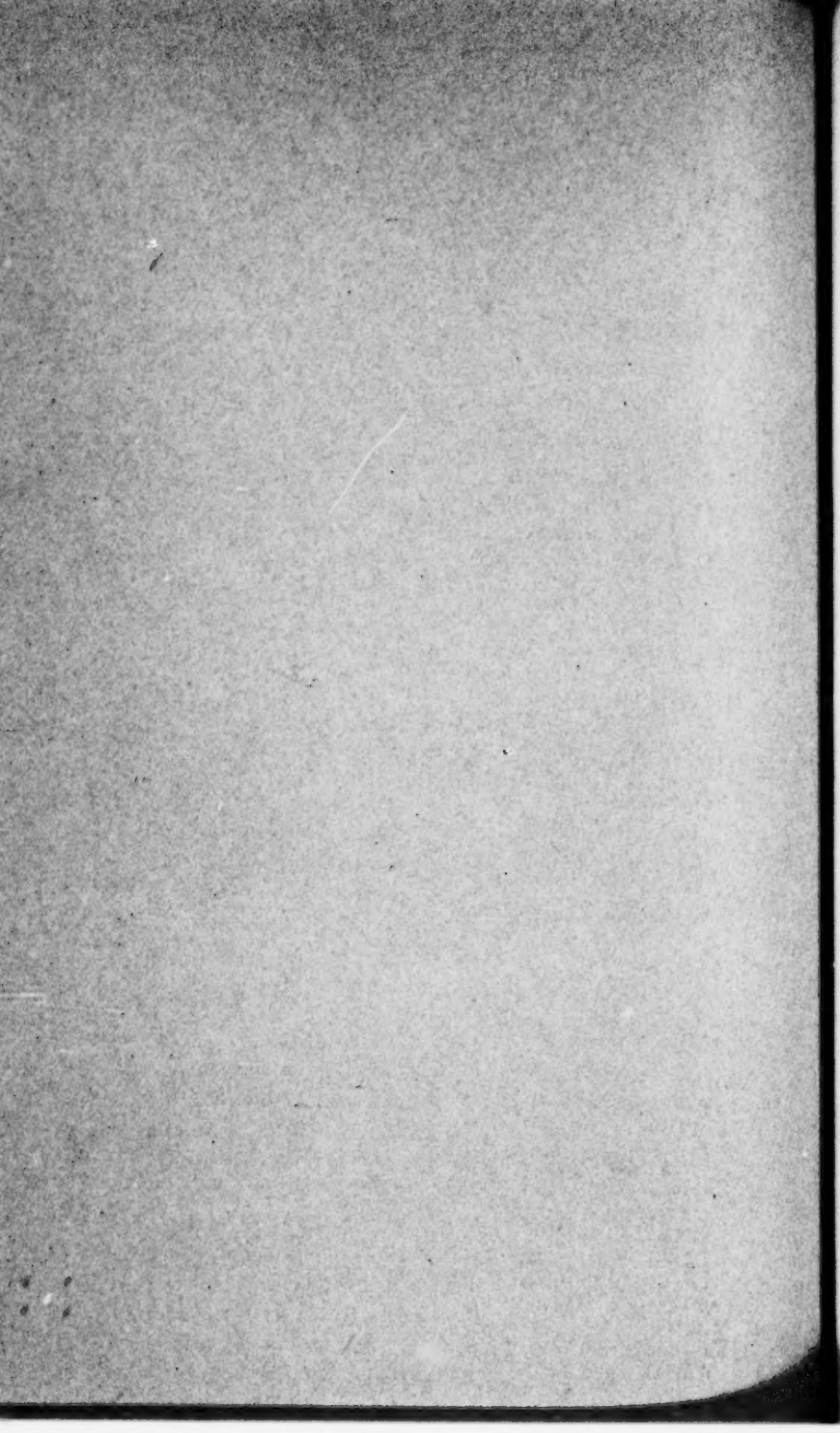
OF THE WYANDOTTE COUNTY GAS COMPANY, KANSAS
CITY GAS COMPANY, KANSAS CITY PIPE LINE
COMPANY, AND FIDELITY TRUST COMPANY.

CHARLES BLOOD SMITH,
*Solicitor for Fidelity Title
& Trust Company.*

JOHN J. JONES,
*Solicitor for George F.
Sharitt as Receiver of Kan-
sas Natural Gas Company.*

JOHN H. ARWOOD,
ROBERT STONE,
GEORGE T. McDERMOTT,
AUSTIN M. COWAN,
CHESTER I. LONG,

*Solicitors for John M. Lan-
don, Managing Receiver of
Kansas Natural Gas Com-
pany.*



**AUTHORITIES ON MOTION OF APPELLEES
TO DISMISS APPEALS OF CERTAIN
APPELLANTS**

The general rule regarding estoppel to allege error is stated as follows in a note in 29 L. R. A. (N. S.) p. 2:

"It is the general rule that a litigant who has voluntarily, and with knowledge of all the material facts, accepted the benefits of an order, decree, or judgment of a court, cannot afterwards take or prosecute an appeal or writ of error to reverse it. He will not be heard to say that it was erroneous. His conduct amounts to a release of errors. His acceptance of benefits is a waiver of all errors, and estops him to question the correctness and justice of the order, decree, or judgment which has given him such benefits."

In *Albright v. Oyster*, 60 Fed. 644 (8th. C. C. A.), Circuit Judges Sanborn and Caldwell, the following statement was made in the opinion:

"No rule is better settled than that a litigant who accepts the benefits or any substantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escaping its burdens. He cannot avail himself of its advantages, and then question its disadvantages in a higher court."

The Supreme Court of Kansas said in *Fidelity Co. v. Kepley*, 66 Kan. 343, 71 Pac. 818, where appellant had recognized the validity of a judgment against him by making it the basis of an action in his behalf against other parties:

"This court has many times decided that a party who complains of a judgment must be consistent in his conduct with reference to it. If he recognizes its validity he cannot be heard to say that it is invalid."

The same rule is stated in substantially the same form in 3 Corpus Juris 679, Sec. 552, as well as the exceptions to the rule.

In *Elwert v. Marley*, 99 Pac 887, (Ore.) the following statement is made:

"So any act, on the part of a defendant, by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right of appeal therefrom or to bring error to reverse it."

In *Terry v. Bank*, 93 U. S. 38, 23 L. Ed. 794, a decree was entered allowing interest on the claims of various parties. The court said:

"The third exception, which relates to the parties represented by *Stone and Ackerman*, questions an allowance of interest on their claims. The sufficient answer to this is, that appellant claimed and received interest on his claims in precisely the same manner, which made these parties equal in the matter, and which estops appellant from alleging the action of the court to be error."

The following is quoted from *Chase v. Driver*, 92

Fed. 780 (8th C. C. A.), where appellant appealed from a decree for which he had prayed:

"He took the benefit of the sale offered him under the decree which he had sought, and it is too late for him now to escape from the terms prescribed or the burdens imposed thereby. One who accepts the benefits of a decree or judgment is thereby estopped from reviewing it, or from escaping from its burdens."

Supreme Court of the United States

October Term, 1918.

No. 277.

THE PUBLIC UTILITIES COMMISSION FOR THE STATE OF KANSAS ET AL.,
Appellants,

VS.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS
COMPANY, ET AL.

Filed September 20, 1917.

No. 329.

KANSAS CITY, MISSOURI; THE PUBLIC SERVICE COMMISSION OF THE
STATE OF MISSOURI, ET AL., *Appellants,*

VS.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS
COMPANY, ET AL.

Filed January 10, 1918.

No. 330.

KANSAS CITY GAS COMPANY, THE WYANDOTTE COUNTY GAS
COMPANY, ET AL., *Appellants,*

VS.

KANSAS NATURAL GAS COMPANY, JOHN M. LANDON AND GEORGE F.
SHARITT, RECEIVERS, AND FIDELITY TITLE AND TRUST COMPANY.

Filed January 14, 1918.

No. 353.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS ET AL.,
Appellants,

VS.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL GAS
COMPANY, ET AL.

Filed February 6, 1918.

*Appeals from the District Court of the United States for the
District of Kansas.*

MOTION TO DISMISS THE APPEALS

OF THE WYANDOTTE COUNTY GAS COMPANY, KANSAS
CITY GAS COMPANY, KANSAS CITY PIPE LINE
COMPANY, AND FIDELITY TRUST COMPANY.

Come now the appellees, John M. Landon, as
Receiver of the Kansas Natural Gas Company,
Fidelity Title & Trust Company, and George F.
Sharitt, as Receiver of the Kansas Natural Gas

Company, and each of them moves the court to dismiss the appeals of The Wyandotte County Gas Company, Kansas City Gas Company, Kansas City Pipe Line Company and Fidelity Trust Company, and each of them, for the following reasons, to-wit:

1. Because the decree of July 5, 1917 (Rec., p. 602), appealed from by the Wyandotte County Gas Company, is in favor of said Wyandotte County Gas Company and not against it, and was entered in its favor at the request of its counsel made in open court at Kansas City, Kansas, on July 5, 1917.

2. Because the said Wyandotte County Gas Company has recognized the validity of said decree of July 5, 1917 (Rec., p. 602), and the decree of August 13, 1917 (Rec., p. 621), from which it has now appealed by filing in the court below since the entry of said decrees and the allowance of its appeals an application in Case No. 1-N In Equity, being the principal suit to which this suit is ancillary, in which application it seeks additional and affirmative relief on the basis of said decrees, alleging that the 60-cent rate prescribed by the court (Rec., p. 1069) is non-compensatory and that it is entitled to 60 per centum of a rate of \$1.00 per thousand cubic feet, which rate of \$1.00 it asks the court to establish for the city of Kansas City, Kansas, and the city of Rosedale, Kansas. A true and correct copy of said application is hereto attached and marked Exhibit "A." That said Wyandotte County Gas Company, having recognized the jurisdiction of the court below to prescribe rates to be charged consumers in said

two cities for natural gas transported and delivered to such consumers, and having sought to avail itself of the benefits of said decrees enjoining the authorities of the state of Kansas from interfering with the interstate commerce conducted by the Receiver, should not now be permitted to urge its appeals from said two decrees.

3. Because the Kansas City Gas Company, appellant, has recognized the validity of said decree of August 13, 1917, (Rec. 621) from which it has now appealed by filing in the court below since the entry of said decree and the allowance of its appeals an application in Case No. 1-N in Equity, being the principal suit to which this suit is ancillary, in which application it seeks additional and affirmative relief on the basis of said decree, alleging that the 60-cent rate prescribed by the court (Rec., p. 1069) is non-compensatory and that it is entitled to 60 per centum of a rate of \$1.00 per thousand cubic feet of natural gas sold and delivered to consumers, which rate of \$1.00 it asks the court to establish for the city of Kansas City, Missouri, for gas sold and delivered to consumers by the Receiver in said city. A true and correct copy of said application is hereto attached, marked Exhibit "B" and made a part hereof.

That said Kansas City Gas Company, having recognized the jurisdiction of the court below to prescribe rates to be charged consumers in said city for natural gas transported and delivered to such consumers, and having sought to avail itself of the benefits of said decree enjoining the authorities of the state of Missouri from interfering with

the interstate commerce conducted by the Receiver, should not now be permitted to urge its appeals from said decree.

4. Because the sole interest of the Kansas City Pipe Line Company and Fidelity Trust Company in the appeals taken by them is that part of the decree of August 13, 1917 (Rec., p. 623, Subdivisions 1 and 2 under Fifth), which determined that the contracts originally entered into by the Kansas City Pipe Line Company and assumed by the lease to the Kansas Natural Gas Company dated February 2, 1906, were not binding on the Receiver, and that said proposition was already *res adjudicata* as to the said Kansas City Pipe Line Company and Fidelity Trust Company, its trustee, for the reason that it had already been conclusively determined that said lease of February 2, 1906, was not binding on the Receiver or Receivers of the court below, in Causes Nos. 1351 and No. 1-N (consolidated) in Equity in the court below on the appeals of the Kansas City Pipe Line Company and Fidelity Trust Company to the Circuit Court of Appeals, Eighth Circuit, the opinion and judgment of said Circuit Court of Appeals being reported in 217 Federal at page 187. (See order spreading mandate of said court of record in the court below, Rec., p. 1002.)

Wherefore the appellees first above named pray this court to dismiss the appeals of the Wyandotte County Gas Company, Kansas City Gas Company,

Fidelity Trust Company and Kansas City Pipe Line Company, and each of them.

CHARLES BLOOD SMITH,
*Solicitor for Fidelity Title
& Trust Company.*

JOHN J. JONES,
*Solicitor for George F.
Sharitt as Receiver of Kan-
sas Natural Gas Company.*

JOHN H. ATWOOD,

ROBERT STONE,

GEORGE T. McDERMOTT,

AUSTIN M. COWAN,

CHESTER I. LONG,

*Solicitors for John M. Lan-
don, Managing Receiver of
Kansas Natural Gas Com-
pany.*

State of Missouri, County of Jackson—ss.

Robert Stone, of lawful age, being first duly sworn, on his oath deposes and says:

That on July 5, 1917, he was and still is one of the Solicitors of Record for John M. Landon, Managing Receiver of the Kansas Natural Gas Company, in Causes No. 1351 and 1-N in Equity (consolidated) pending in the District Court of the United States for the District of Kansas, and also in Cause No. 136-N in Equity, in the same court, entitled John M. Landon, Receiver of the Kansas Natural Gas Company, plaintiff, v. Public Utilities Commission of the State of Kansas *et al.*, defendants, and that on said day he was in the court room of said court at Kansas City, Kansas, when said court was about to enter the decree in said Cause No. 136-N in favor of said John M. Landon and others and against the Public Utilities Commission of Kansas and others, a copy of which decree is set out in the record in this court, commencing at page 601, and that the decree as originally prepared did not grant any relief to the defendant The Wyandotte County Gas Company, but that in open court J. W. Dana, as solicitor for

said The Wyandotte County Gas Company, orally requested the court to grant the same relief to said The Wyandotte County Gas Company as granted to said John M. Landon as Receiver of the Kansas Natural Gas Company, and that thereupon the court granted such request, and entered the decree as set forth in the record in this cause with the consent and at the request of said The Wyandotte County Gas Company, giving to it the injunctive relief as shown in said decree.

Further affiant saith not.

.....

Exhibit "A."

In the District Court of the United States for the
District of Kansas. First Division.

Fidelity Title & Trust Company,

Plaintiff,

No. 1-N

vs.

Consolidated with

Kansas Natural Gas Company

No. 1351.

et al., Defendants,

APPLICATION OF THE WYANDOTTE COUNTY GAS COMPANY FOR APPROVAL OF INCREASED JOINT-RATE.

The Wyandotte County Gas Company states and shows to the Court:

1. That it is a corporation duly organized and existing under the laws of the State of Kansas and a citizen and resident of said State and the First Judicial Division thereof, and that John M. Landon, Receiver herein, is a citizen and resident of said State and the First Judicial Division thereof.

2. That it is engaged in the business of distributing and selling natural and manufactured gas in Kansas City, Kansas, and Rosedale, Kansas.

3. That prior to September 1, 1917, the Company received, distributed and sold natural gas pursuant to a certain supply-contract existing between this Company and the Kansas Natural Gas Company; that on August 13, 1917, this Court entered its final decree in the case of *John M. Landon, Receiver, v. The Public Utilities Commission of Kansas et al.*, No. 136-N, enjoining the existing rates and decreeing that:

"The defendant distributing companies are permanently enjoined from enforcing the said supply contracts or rates fixed or referred to therein against plaintiff and from interfering with plaintiff in establishing and maintaining such rates as this Court has approved or may hereafter approve for consumers of natural gas in Kansas and Missouri."

Said decree is hereby referred to and made a part hereof.

4. That thereupon this Court entered an order herein fixing and approving a joint-rate for this Company and the Receivers to charge consumers of gas in Kansas City, Kansas, and Rosedale, Kansas, of 60 cents per thousand cubic feet and 50 cents for minimum bills and 10 per centum penalty for non-payment of bills when due, and ordered the division thereof $57\frac{1}{2}$ per centum to the Receiver and $42\frac{1}{2}$ per centum to this Company; whereupon this Company, though not a party

hereto, objected to said joint-rate and the division thereof, but thereafter put the same into effect for a trial period.

5. After the trial of said joint-rate for ten months, this Company states that said joint-rate and the percentage thereof appropriated to this Company is unreasonably low, non-compensatory and confiscatory of the property of this Company, and said order fixing said joint-rate and the division thereof for this Company and continuing the same in effect without a hearing deprives this Company of its property without due process of law and takes its property for public use without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

6. The Company states that the reasonable value and present worth of its property used and useful in the service of the public in the distribution and sale of natural gas is at least \$1,800,000, on the basis of the purchasing power of money in normal times; that it is entitled to 8 per centum return upon said value over and above taxes, maintenance and depreciation charges and operating costs; that its gross receipts from the sale of natural gas from September 1, 1917, to July 1, 1918, were \$368,738.53; that its taxes, maintenance and depreciation charges and necessary operating costs including the sums paid for natural gas during said period were \$355,404.18, leaving only \$13,334.35 applicable to interest and profits, being less than one per centum; that by reason thereof this Company has sustained a loss of legitimate earnings of \$106,665.65 in said ten months and is now and

will continue to sustain losses approximating \$125,000 per annum.

7. The Company further states that no rate, joint-rate or schedule of rates or joint-rates which will net this Company less than 50 cents for minimum bills and 60 cents per thousand cubic feet for the handling, distribution and sale of natural gas will afford this Company even six per centum return on the reasonable value of its property used and useful in the service of the public.

8. The Company further states that it has at great expense installed and is now maintaining a gas-manufacturing-works sufficient in size and capacity to furnish in excess of 2,000,000 cubic feet of manufactured gas per day; that on and after the first shortage in the supply of natural gas by the Receiver, this Company will manufacture, distribute and sell manufactured gas to Kansas City, Kansas, and its inhabitants, and will thereafter desire to take, distribute and sell only such natural gas as may be necessary to supplement said manufactured gas supply and furnish a good, continuous and satisfactory service to its patrons, and will thereupon and thereafter take and purchase from the Receiver only such natural gas as may be necessary for such purpose, not exceeding 2 million cubic feet per day, and hereby offers to pay said Receiver 25 cents per thousand cubic feet for such natural gas properly and accurately measured at the Receiver's measuring station at Westport and College avenues in Rosedale, Kansas, said measurements to be corrected to a basis of 8 oz. above atmospheric pressure and at a temperature of 50° Fahrenheit.

Wherefore, the premises considered, The Wyandotte County Gas Company moves the Court to order and approve the joint-rate for this Company and the Receiver, effective in Kansas City, Kansas, and Rosedale, Kansas, on and after the regular August, 1918, meter-readings of at least \$1.00 net per thousand cubic feet and 50 cents for minimum bills and 10 per centum penalty for the non-payment of bills when due, for an all-natural-gas service; and to direct the Receiver and this Company to put the same into effect and to divide the gross receipts from the sale of said natural gas, 40 per centum to the Receiver and 60 per centum to the Wyandotte County Gas Company; or to order and approve such other separate rates or joint-rate and division thereof as may be equitable and just.

To authorize and order said Receiver, on and after receiving written notice from this Company, to furnish, deliver and sell to the Company such natural gas as it may need to supplement its supply of manufactured gas at 25 cents per thousand cubic feet properly and accurately measured at Westport and College avenues, Rosedale, Kansas, said measurements to be corrected to a basis of 8 oz. above atmospheric pressure and at a temperature of 50° Fahrenheit.

J. W. DANA,

*Solicitor for The Wyandotte County
Gas Company.*

(Filed 9-7-18. F. L. Campbell, Clerk.)

Exhibit "B."

In the District Court of the United States for the
District of Kansas. First Division.

Fidelity Title & Trust Company,
Plaintiff,

No. 1-N

vs.

Consolidated with

Kansas Natural Gas Co. *et al.*, No. 1351.
Defendants.

**APPLICATION OF KANSAS CITY GAS COMPANY FOR
APPROVAL OF INCREASED JOINT-RATE.**

The Kansas City Gas Company states and shows to the court:

1. That it is a corporation duly organized and existing under the laws of the State of Missouri and a citizen and resident of said State and of the Western Division of the Western Judicial District thereof, and that John M. Landon, Receiver herein, is a citizen and resident of the State of Kansas and the First Judicial Division thereof.

2. That it is engaged in the business of distributing and selling natural gas in Kansas City, Missouri.

3. That prior to September 1, 1917, the Company received, distributed and sold natural gas pursuant to certain supply-contracts existing between this Company and the Kansas Natural Gas Company; that on August 13, 1917, this court entered its final decree in the case of *John M. Landon, Receiver, v. The Public Utilities Commission of Kansas et al.*, No. 136-N, enjoining the existing rates and decreeing that:

"The defendant distributing companies are permanently enjoined from enforcing the said

supply contracts or rates fixed or referred to therein against plaintiff and from interfering with plaintiff in establishing and maintaining such rates as this Court has approved or may hereafter approve for consumers of natural gas in Kansas and Missouri."

Said decree is hereby referred to and made a part hereof.

4. That thereupon this court entered an order herein fixing and approving a joint-rate for this Company and the Receiver to charge consumers of gas in Kansas City, Missouri, of 60 cents per thousand cubic feet and 50 cents for minimum bills and 10 per centum penalty for non-payment of bills when due, and ordered the division thereof of $57\frac{1}{2}$ per centum to the Receiver and $42\frac{1}{2}$ per centum to this Company; whereupon this Company, though not a party thereto, objected to said joint-rate and the division thereof, but thereafter put the same into effect for a trial period.

5. After the trial of said joint-rate for ten months, this Company states that said joint-rate and the percentage thereof appropriated to this Company is unreasonably low, non-compensatory and confiscatory of the property of this Company, and said order fixing said joint-rate and the division thereof for this Company and continuing the same in effect without a hearing deprives this Company of its property without due process of law and takes its property for public use without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

6. The Company states that the reasonable value and present worth of its property used and

useful in the service of the public in the distribution and sale of natural gas is at least \$8,500,000 on the basis of the purchasing power of money in normal times; that it is entitled to 8 per centum return upon said value over and above taxes, maintenance and depreciation charges and operating costs; that its gross receipts from September 1, 1917, to July 1, 1918, were \$1,415,230.06; that its taxes, maintenance and depreciation charges and necessary operating costs including the sums paid for natural gas during said period were \$1,340,981.12, leaving only \$74,248.94 applicable to interest and profits, being less than one per centum; that by reason thereof this Company has sustained a loss of legitimate earnings of \$492,-417.73 in said ten months and is now and will continue to sustain losses approximating \$600,000 per annum.

7. The Company further states that no rate, joint-rate or schedule of rates or joint-rates which will net this Company less than 50 cents for minimum bills and 60 cents per thousand cubic feet for the handling, distribution and sale of natural gas will afford this Company even six per centum return on the reasonable value of its property used and useful in the service of the public.

Wherefore, the premises considered, the Kansas City Gas Company moves the Court to order and approve the joint-rate for this Company and the Receiver, effective in Kansas City, Missouri, on and after the regular August, 1918, meter-readings of at least \$1.00 net per thousand cubic feet and 50 cents for minimum bills and 10 per centum penalty for the non-payment of bills when due, for

an all-natural-gas service; and to direct the Receiver and this Company to put the same into effect and to divide the gross receipts from the sale of said natural gas, 40 per centum to the Receiver and 60 per centum to the Kansas City Gas Company; or to order and approve such other separate rates or joint-rate and division thereof as may be equitable and just.

J. W. DANA,

Solicitor for Kansas City Gas Company.

(Filed Sept. 7, 1918. F. L. Campbell, Clerk.)

SEP 26 1918

JAMES D. MAHER;
CLERK

IN THE
Supreme Court of the United States.
OCTOBER TERM, 1918.

No. 330.

(Submitted and Considered in Nos. 227, 329 and 353.)

KANSAS CITY GAS COMPANY, THE WYANDOTTE
COUNTY GAS COMPANY ET AL., APPELLANTS,

VS.

KANSAS NATURAL GAS COMPANY, JOHN M.
LANDON AND GEORGE F. SHARITT, RE-
CEIVERS, AND FIDELITY TITLE
AND TRUST COMPANY.

Filed January 14, 1918.

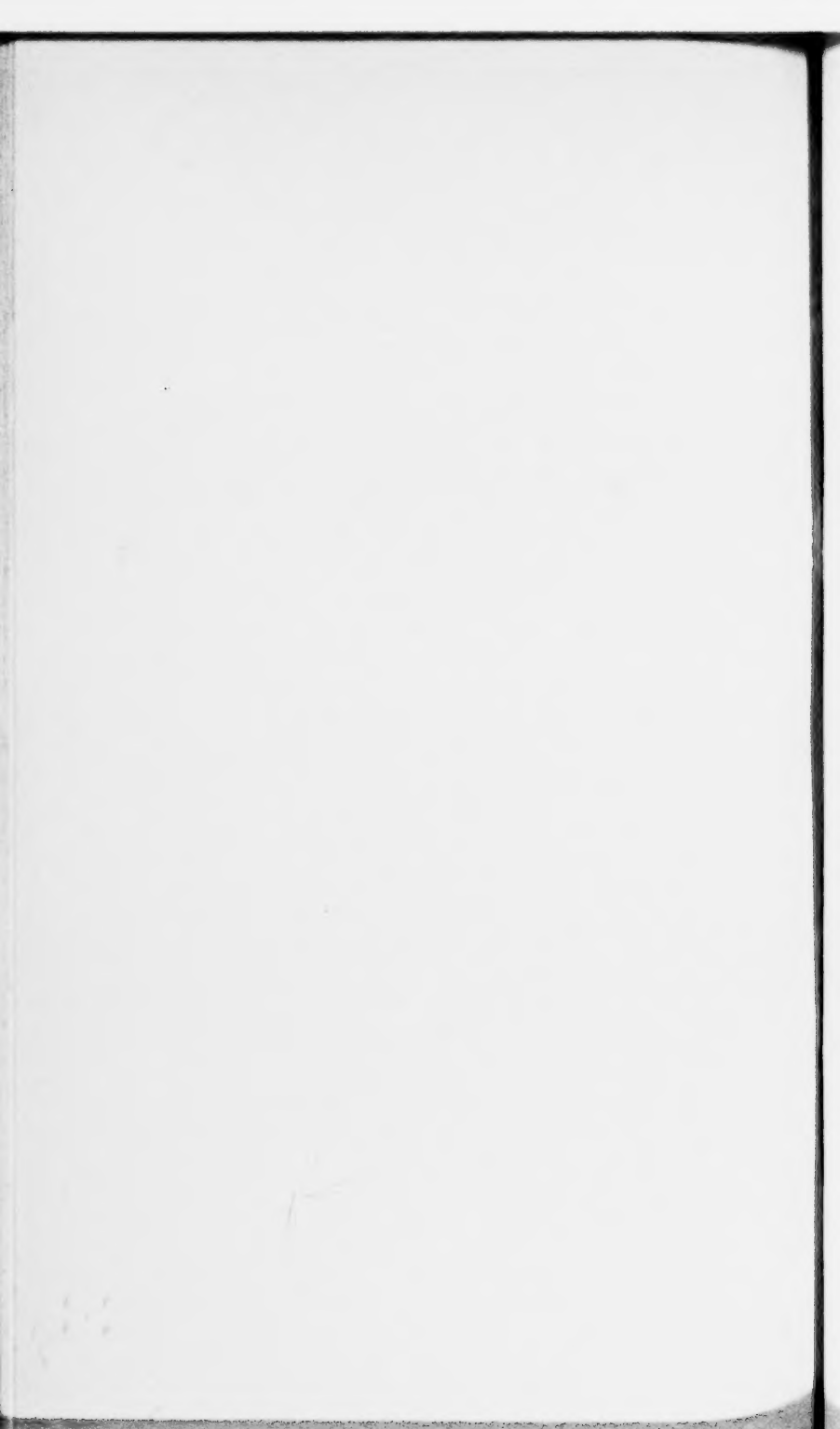
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF KANSAS.

Brief for Appellants

KANSAS CITY GAS COMPANY, THE WYANDOTTE
COUNTY GAS COMPANY, FIDELITY ~~TITLE~~ AND
TRUST COMPANY AND THE KANSAS
CITY PIPE LINE COMPANY.

J. W. DANA,
Solicitor for Appellants.

910 Grand Ave., K. C., Mo.



Service acknowledged September _____, 1918.

*Solicitor for John M. Landon, Receiver,
Kansas Natural Gas Company.*

Solicitor for Kansas Natural Gas Company.

*Solicitor for Fidelity Title and Trust
Company.*

Receiver of Kansas Natural Gas Company.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 330.

(Submitted and Considered in Nos. 227, 329 and 353.)

KANSAS CITY GAS COMPANY, THE WYANDOTTE
COUNTY GAS COMPANY ET AL., APPELLANTS,

VS.

KANSAS NATURAL GAS COMPANY, JOHN M.
LANDON AND GEORGE F. SHARITT, RE-
CEIVERS, AND FIDELITY TITLE
AND TRUST COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF KANSAS.

Brief for Appellants

KANSAS CITY GAS COMPANY, THE WYANDOTTE
COUNTY GAS COMPANY, FIDELITY ~~TITLE AND~~
TRUST COMPANY AND THE KANSAS
CITY PIPE LINE COMPANY.

STATEMENT.

This is a separate appeal allowed on motion (Rec. 723-735) and order of severance (Rec. 740-769), from the decree

of the District Court of the United States for the District of Kansas, Hon. Wilbur F. Booth, Special Judge, rendered Aug. 13, 1917 (Rec. 621), in the case entitled John M. Landon, Receiver of the Kansas Natural Gas Company, v. The Public Utilities Commission of Kansas *et al.*, No. 136-X in which were joined as defendants the Kansas Natural Gas Company, the Fidelity Title and Trust Company and Delaware Trust Company, Trustees of its mortgages, George F. Sharitt, "potential" Receiver of said company, The Kansas City Pipe Line Company, owner of certain pipe-lines held under lease and operated by said Receiver, the Fidelity Trust Company, Trustee of said Pipe Line Company's mortgage, the Public Utilities Commission of Kansas, the Public Service Commission of Missouri, the Attorney-Generals and forty-seven cities and towns of said states and thirty-two independent local gas companies doing business in said cities, including appellants the Kansas City Gas Company of Kansas City, Missouri, and The Wyandotte County Gas Company of Kansas City, Kansas. (Rec. 8.)

The Kansas Natural Gas Company, Fidelity Title and Trust Company, Trustee of its first mortgage, and George F. Sharitt, "potential" Receiver of said Company (Rec. 1001-1003) though nominally defendants, adopted the allegations of the Receiver's bill and supplemental bill and joined in the prayer for the same relief, and should be marshalled as plaintiffs in the case. (Rec. 89, 222, 227).

The bill (Rec. 8) and supplemental bill (Rec. 343) in substance allege, that the suit is dependent upon, ancillary to and in aid of the jurisdiction (Rec. 10) of the trial court in a certain foreclosure suit pending in said court entitled, *Fidelity Title and Trust Company v. Kansas Natural Gas Company and Delaware Trust Company*, No. 1-N, since consolidated with an alleged creditors' suit No. 1351; that the Public Utilities Act of Kansas, Laws 1911, Chap. 238, Sec. 30, fixing rates in effect January 1, 1911, as the legal rates

and prohibiting changes therein without the consent of the Public Utilities Commission is confiscatory; that the 28-cent rate ordered by the Kansas Commission Dec. 10, 1915, (Rec. 53) is confiscatory; that the Public Service Act of Missouri, Laws 1913, Secs. 69 and 70 (Rec. 781-782) empowering the Public Service Commission to suspend rates filed by utilities for an aggregate of twelve months is confiscatory; that the franchise-ordinances of Kansas City, Missouri (Rec. 832), and Kansas City, Kansas (Rec. 821), and said forty-five other cities and towns naming rates for natural gas charged by local gas companies doing business therein are confiscatory; that certain natural gas-supply-contracts (Rec. 828 and 844), existing between the Kansas Natural Gas Company and said local gas companies under which gas was furnished to said companies are improvident, wasteful, destructive and a fraud upon the trust estate in the hands of the Receiver (Rec. 43); and that said Public Service Acts, commission orders, franchise-ordinances and gas-supply-contracts and the attempts and threats of the several defendants to enforce the same were each and all an interference with and burden upon interstate commerce in natural gas.

The relief prayed (Rec. 45, 358) was to enjoin the enforcement of said Public Service and Utility Acts, said 28-cent rate order, and said suspension orders of the commissions, and said franchise rates, as confiscatory; and to further enjoin, as a burden upon and an interference with interstate commerce, all of said Acts, orders and franchises together with the enforcement of said gas-supply-contracts as between the Receiver and said local companies.

The answer and counterclaim (Rec. 233), the amended answer (Rec. 496) and supplemental answer (Rec. 612) of the Kansas City Gas Company, after certain admissions, in substance allege, that the bills do not state a cause of action; that the Kansas City Gas Company owns and holds franchises in and upon the public streets of Kansas City,

Missouri, authorizing it to furnish and sell natural gas, and that it owns and operates a gas plant and distribution system therein for such purpose; that the Kansas Natural Gas Company and its Receiver have, own or hold no franchise or right in or upon the public streets of said city or plant, mains or pipes therein for the purpose of furnishing and selling natural gas to said city and its inhabitants; that the Kansas City Gas Company obtains its natural gas from the Kansas Natural Gas Company and its Receiver under and pursuant to certain contracts in writing dated Nov. 17, 1906, and Dec. 3, 1906 (Rec. 844), between The Kansas City Pipe Line Company and McGowan, Small and Morgan, Grantees of said natural gas franchise in Kansas City, Missouri, which said contracts have been duly assigned, sold and transferred by the Pipe Line Company to the Kansas Natural Gas Company and the obligations thereof assumed (Rec. 856) by said company; that said contracts have also been assigned, sold and transferred by McGowan, Small and Morgan to the Kansas City Gas Company (Rec. 240); that said contracts have never been disavowed by the court or Receiver (Rec. 238, par. XXXIII) and were never fraudulent in law or in fact; that said contracts in substance provide for the delivery and sale of natural gas at the city gates of the Kansas City Gas Company's plant by the Kansas Natural Gas Company, and in sufficient amounts at 20 pounds pressure, so as to enable the Kansas City Gas Company to furnish the same to its consumers for lighting and cooking and for domestic heating, industrial and manufacturing purposes; that said contracts stipulated a certain consideration to be paid by the Kansas City Gas Company to the Kansas Natural Gas Company therefor, to-wit, "A sum equal to 62½ per cent of the gross receipts from the sale of said gas *at the rate of 27 cents per thousand cubic feet as measured by the consumers' meters until Nov., 1916, and thereafter at the rate of 30 cents, as measured by consumers' meters*"

(Rec. 503), and that said Kansas Natural Gas Company and its Receivers have continued up to the present time to supply this defendant with natural gas under the terms of said contracts and that this defendant has never agreed to accept, receive or pay for said gas except upon the terms of said supply-contracts and at the prices therein fixed (Rec. 503); that the Kansas City Gas Company has paid said Kansas Natural Gas Company and its Receiver for said gas according to the terms of said contract and that the Public Service Commission of Missouri did on the 10th day of August, 1916 (Rec. 365), enter an order fixing a 30-cent rate to be charged by the Kansas City Gas Company for the purpose of enabling said company to pay said Kansas Natural Gas Company and Receiver the consideration named in said contracts for the gas furnished, to-wit, 62½% of the gross receipts obtained from the sale of said gas at a 30-cent rate. The Kansas City Gas Company concedes the jurisdiction of the Public Service Commission of Missouri to regulate and fix reasonable rates to be charged by said company.

That said Kansas Natural Gas Company and its Receivers have from time to time failed and neglected to furnish said gas in sufficient quantities and at sufficient pressures as provided in said contracts to enable the Kansas City Gas Company to furnish the same to its patrons for lighting and cooking and for heating, manufacturing and industrial purposes as provided in said contracts and said Kansas City Gas Company has sustained great and irreparable loss, injury and damage by reason thereof (Rec. 614).

The prayer of said answers and counterclaim was that the Receiver's bill be dismissed (Rec. 506, 614) and that the Kansas Natural Gas Company and Receiver be required (Rec. 248) to furnish, supply and deliver to the Kansas City Gas Company at or near the corporate limits of Kansas City, Missouri, at a pressure of 20 pounds natural gas in such amount as will at all times fully sup-

ply the demand for all purposes of consumption as provided and in accordance with said contracts (Rec. 248).

The answer (Rec. 100), amended answer (Rec. 525) and supplemental answer (Rec. 615) of The Wyandotte County Gas Company adopt or allege substantially the same facts that the Kansas City Gas Company does, together with the further fact that this defendant is now collecting and receiving from consumers and paying to said plaintiff $62\frac{1}{2}$ per cent of 28 cents net per thousand cubic feet (1 cent in excess of said contract price) (Rec. 34); and this defendant will, as per contract on and after Nov. 19, 1916, increase its rates to 30c and charge and collect from its consumers and pay to plaintiff $62\frac{1}{2}$ per cent of the gross receipts from the sale of gas at 30 cents net per thousand cubic feet; that by reason thereof, the price paid to plaintiff and his interest in the rates now in force and collected by this defendant are fixed by contract and not by any order, rule or regulation of the Public Utilities Commission of Kansas, and plaintiff herein is not entitled to a decree of injunction against said Commission, enjoining the rates now in force and collected by this defendant; *but the plaintiff and this defendant will be entitled to an injunction against said commission if it should attempt to interfere with this defendant putting into force and effect said 30 cent net rate on and after Nov. 19, 1916*" (Rec. 534).

The Wyandotte Company's prayer asks (Rec. 535) that the bills be dismissed in so far as they charge or attempt to charge any cause of action or demand any relief against said company; that any action to disavow, cancel or annul said gas-supply-contract be abated in this court and cause pending the exercise of jurisdiction over the Kansas Natural Gas Company and the plaintiff as Receiver of said company by the District Court of Montgomery County, Kansas, in the State Case there pending (Rec. 535); and that (Rec. 535) "the relief demanded in

the plaintiff's original bill of complaint against the Public Utilities Commission of the State of Kansas be granted to the extent of enjoining said commission from interfering with the collection of said 30-cent net rate provided for and agreed to in said contract of Feb. 1, 1906, existing between this defendant and the Kansas Natural Gas Company" (Rec. 535).

The Kansas City Gas Company and The Wyandotte County Gas Company filed answers (Rec. 518, 520, 525, 537, 539) to the joint bills designated "separate answers" of the Kansas Natural Gas Company and George F. Sharitt, potential Receiver of said company, in which they adopted the allegations of their answers and counter-claims against the Receiver's bills.

The record shows (Rec. 564 and 870) that between 1904 and 1908 the Kaw Gas Company, the Kansas Natural Gas Company and The Kansas City Pipe Line Company were organized for the purpose and engaged in the business of acquiring and developing gas lands, leases and productions in southern Kansas, constructing pipe-lines to carry gas to the cities and towns of eastern Kansas and western Missouri and making contracts for the sale of said gas to local gas companies having gas plants and holding franchises to use the streets and to furnish and sell natural gas in said cities and towns. Later the Mar-net Mining Company was organized to acquire gas lands, leases and productions in Oklahoma and to build and extend the pipe-line system of the Kansas Natural Gas Company into said state. By assignments and lease-contracts the properties of all these companies were merged into one system and came under the active control and management of the Kansas Natural Gas Company and the other companies became inactive or holding companies.

Originally the gas was drilled and produced by the Kansas Natural Gas Company on its own leases but as the demand increased and the known fields receded to

the south and the supply commenced to wane, said company and its Receiver purchased more and more of their supply until at the time of the hearing the Receiver was purchasing 92½ per cent and producing only 7½ per cent of the gas he sold (Rec. 298).

The gas flows from the wells into the field gathering lines and thence into the pipe-lines by the natural force of the "rock pressures" (Rec. 808). The application of the law of expanding gases (Rec. 808 and 809) by the compression of the gas at intervals along the pipe-lines causes it to flow forward and into the distribution plants of the local companies in the cities and towns supplied.

The Kansas Natural Gas Company had no plants or distribution mains or franchises to use the streets or to furnish or sell natural gas in the cities supplied (Rec. 806). Between 1904 and 1908 said company or its subsidiaries entered into certain written contracts with the various distributing companies owning plants and distribution mains and holding franchises in said cities, among which were the contracts between The Kansas City Pipe Line Company as party of the first part, predecessor of the Kansas Natural Gas Company, and McGowan, Small and Morgan, grantees, as parties of the second part, predecessors of the Kansas City Gas Company, dated Nov. 17 and Dec. 3, 1906 (Rec. 844), and a similar contract between the same Pipe Line Company, and the Wyandotte Gas Company, predecessor of The Wyandotte County Gas Company, dated Feb. 1, 1906 (Rec. 828). Said supply-contracts recited that first party was the owner of gas lands and leases in southern Kansas and that second party was the owner of an ordinance to furnish and sell gas in Kansas City, Missouri, and that:

"1. The party of the first part *hereby agrees* that it will during the *period of such ordinance*, or any extension or renewal thereof, or of any ordinance which may be obtained, either in the interest of the parties

of the second part, or of their property, *supply and deliver* through its said pipe line or lines *to said parties of the second part*, or any successor in the ownership of the property for the distribution of gas for Kansas City, Missouri, at a pressure of twenty (20) pounds at the point of delivery above mentioned, *natural gas* in such amount as will at all times fully supply the demand for all purposes of consumption, as provided in this contract, *for the consideration hereinafter mentioned*. However, as the production of gas from the wells and the conveying of it from long distances is subject to accidents and interruptions and failures, the party of the first part does not under this contract undertake to furnish the parties of the second part with an uninterrupted supply of gas for the period named herein, but only to furnish such supply for such a period of time as the wells and pipe lines of the party of the first part and such other resources as the party of the first part shall be able to command are capable of supplying. And it is expressly understood and agreed by the parties of the second part that the party of the first part shall not be liable for any loss, damage or injury that may result either directly or indirectly from such shortages or interruptions, but said party of the first part agrees to use diligence to supply the parties of the second part with a constant and sufficient quantity of merchantable gas for all consumers.

2. It is hereby agreed between the parties hereto that the parties of the second part may make special contracts for the sale of natural gas for manufacturing purposes in said city at lower rates than those specified in said ordinance, and that they shall and will make such special contracts in accordance with their agreement to that effect contained in Section 13 of said ordinance, copy of which is hereto attached.

In order to protect the domestic trade, however, the parties of the second part may, without notice, if the supply of natural gas shall make it necessary to do so, reduce the amount of such gas to be furnished under any such special contracts or entirely stop the supply of the same, and the agreement of the

party of the first part herein to furnish a full supply of natural gas shall not apply to such gas to be sold for manufacturing purposes if the same shall impair its ability to furnish a full supply under this contract as to pressure, etc., for the domestic trade, excepting, however, that the parties of the second part shall always have a right to sell natural gas to manufacturers at the same rates and under the same terms and conditions as to domestic consumers, and the parties of the second part agree that any contract they make to furnish gas to manufacturers shall contain provisions by which the parties of the second part may without notice diminish the amount of gas supplied under such contract or entirely stop the same.

So long as the party of the first part is able to supply the same, the parties of the second part agree to buy from the party of the first part all the gas they may need to fully supply the demand for domestic consumption in the said city and to pay to the party of the first part for the natural gas which they shall receive from said party of the first part for all purposes during the first two years a sum equal to sixty per cent of their gross receipts from the sale of such natural gas in said city of Kansas City, Missouri, and thereafter a sum equal to sixty-two and one-half per cent. of such gross receipts. The parties of the second part make no agreement with the party of the first part respecting the RATES at which they shall sell natural gas to any consumers in Kansas City, Missouri, but expressly reserve to themselves the right to charge their consumers for natural gas any rates not exceeding those mentioned in said ordinance which they may agree upon with such consumers; but if they shall at any time agree to sell gas to domestic consumers or any persons other than manufacturers at less than the maximum rates mentioned in said ordinance, or, except in compliance with their agreement to that effect contained in said Section 13 of said ordinance, to sell gas to manufacturers at a less rate than fifteen cents per thousand cubic feet, and the party of the first part shall be unwilling to accept as its compensation there-

for sixty or sixty-two and one-half per cent., as the case may be, of the gross receipts of the parties of the second part, as aforesaid, for gas so sold, the party of the first part *shall be under no obligation to furnish gas so sold at such lower prices*, and the parties of the second part shall be at liberty to obtain the same from such other source as they may find available" (Italics ours) (Rec. 845).

These contracts further provided (Rec. 846) for monthly statements showing the amount of receipts and the uncollected bills, and for payments on the 15th day of each month; provision was made for the first party to have access to the second parties' books to verify the gas sales and the amounts collected; second parties further agreed to extend and attach business promptly, to properly measure the gas sold to its consumers, permit the first party to inspect the mains, pipes, regulators, meters and appliances of the second parties to determine their condition, and keep the first party advised of the number of meters set, connected and disconnected from month to month; the amount of gas to be used for street lamps and the price therefor was agreed upon. Said contract and all their rights acquired thereunder were assignable to a corporation thereafter to be organized under the laws of Missouri (Rec. 849).

These contracts were thereafter duly assigned by McGowan, Small and Morgan, grantees of said franchise-ordinance, to the Kansas City Gas Company, a Missouri corporation, and by The Kansas City Pipe Line Company to the Kansas Natural Gas Company (Rec. 854).

The ordinance of Kansas City, Missouri, referred to (Rec. 844) attached and marked Exhibit No. 1, to said contract is ordinance 33887 (Rec. 832) of Kansas City, Missouri, granting to McGowan, Small and Morgan, their successors and assigns, the right to use the public streets of said city for the purpose of supplying natural gas to said city and

its inhabitants (Rec. 832). Said ordinance names the rates to be charged, as follows:

"Section 13. The said grantees shall be entitled to charge and collect from consumers of such gas, during the period of five years from and after natural gas is first furnished hereunder at the rate of not to exceed twenty-five cents per thousand cubic feet, and during the period of five years next thereafter at the rate of not to exceed twenty-seven cents per thousand cubic feet, and thereafter during the period of the aforesaid grant at the rate of not exceeding *thirty cents per thousand cubic feet*, and may also make special contracts with consumers at less than the general rate then in force, based upon the amount of gas used and the conditions of the contract, which special rates shall be the same to all consumers using the same amount of gas under the same contract conditions, and schedules of such special rates and the contract conditions shall be filed with the city clerk, and each and every change therein shall also be filed with the city clerk, and be open to public inspection. The grantees agree that they will at all times make special contracts at as low rates as those at which natural gas is sold at the time to any consumers of the same class using the same amount of gas under the same contract conditions who are located approximately as distant from the fields from which they are at the time supplied as Kansas City, Missouri, is from the fields from which it is at the time supplied and who are supplied by the grantees, or anyone from whom the grantees obtain their supply, or anyone whose supply is obtained from those from whom the grantees obtain their supply; provided that this agreement to make such special contracts at such rates shall not be construed to compel the grantees to make such special contracts at as low rates as those in effect at the time in any locality where the grantees, or those from whom the grantees obtain their supply, or any one supplied by those from whom the grantees obtain their supply, may be in bona fide competition with any other supplier of natural gas in such locality; but if the demand from special rate consumers threatens the general supply, the grantees may shut off the supply from any special rate consumer, which shall include all other than domestic consumers, in whole or in part, and if the grantees fail or refuse to do so, the city council may by ordinance require the grantees so to do; provided always that the said grantees shall have the right to charge ten

(10) per cent. additional to all consumers who are in arrears for a longer period than ten (10) days; and provided, further, that the grantees may charge and collect from each person who has a meter installed a minimum monthly bill of fifty cents; provided, however, that if the bill for natural gas consumed in any month shall at the rate then in force exceed the sum of fifty cents, such consumer shall not be charged any minimum bill for that month.

Under the permission and authority hereby granted, the grantees shall furnish natural gas for illuminating, heating and mechanical purposes, which shall at all times be of the same character and quality as when it comes from the earth; and it shall not be mixed with air or otherwise adulterated" (Rec. 833). (The 30-cent rate was in effect on the date of the decree herein) (Rec. 621.)

Said ordinance runs for a period of 30 years from Sept. 27, 1906; provides for the furnishing of natural gas for all domestic purposes including lighting, cooking and heating and for manufacturing purposes, and recites that the grantees covenant that their *contract* for gas supply is with the Kaw Gas Company and The Kansas City Pipe Line Company (Rec. 840); that said contract fixes the price or consideration to be paid by grantees for the gas, will not be changed without the city's consent and that, if the city shall thereafter acquire the plant and property of the grantees, said gas-supply-contract will be assigned, sold and transferred by the grantees to the city to enable it to continue acquiring a supply of natural gas thereunder (Rec. 841).

The supply-contract between the Wyandotte County Gas Company and the Kansas Natural Gas Company is in substantially the same form and attaches and refers to franchise-ordinance 6051 of Kansas City, Kansas (Rec. 829), and the schedule of rates is named therein in the same manner (Rec. Ordinance 821; Contract 828).

In a certain lease dated Jan. 1, 1908 (Rec. 853), in which The Kansas City Pipe Line Company leased all its

gas lands, leases, productions and pipe-lines to the Kansas Natural Gas Company, it is provided:

“Fifth. The Lessee hereby *assumes and covenants to perform all the obligations assumed by the Lessor under the terms of an agreement, dated February 1, 1906, between the Lessor and the Wyandotte Gas Company, for the supply of natural gas to Kansas City, Kansas, and Wyandotte County, in said State, a copy of which is attached hereto, and marked Exhibit A, and those assumed by the Lessor under the terms of a certain other agreement, dated November 17, 1906, between the Lessor and Hugh J. McGowan, Charles E. Small and Randal Morgan, for the supply of natural gas to Kansas City, Missouri, copy of which said last named agreement is hereto attached and marked Exhibit B, and those assumed by the Lessor under the terms of a certain other agreement, dated December 3, 1906, between the Lessor and said Hugh J. McGowan, Charles E. Small and Randal Morgan, copy of which is hereto attached [market] Exhibit C, as amended by an agreement dated December 11, 1907, between the same parties, copy of which is hereto attached marked Exhibit D.*

The Lessee agrees that if the gas wells hereby demised situated in the territory of the Lessor *do not furnish a sufficient volume of gas, or if the pipe line of the Lessor shall not have a delivery capacity sufficient to supply the demands for gas in the cities of Kansas City, Kansas, and Kansas City, Missouri, it, the Lessee, will supplement said gas supply from its own gas wells up to an amount equal to fifty (50) per cent. of the gas, which by the use of due diligence in connecting existing uells and drilling new ones, it may be able to produce from the territory now or hereafter controlled by it; and will construct at its own cost and expense, or, so far as any of the bonds of the Lessor in this lease referred to may be available for the purpose, at the cost and expense of the Lessor, the additional pipe lines necessary for the delivery of gas to supply such demands, whether from the Lessor's or the Lessee's territory: Provided, however, that if the expectation of continuance of the supply of gas shall not be sufficient to warrant the laying of an additional pipe line at any time, the Lessee shall not be required to do so, whatever the demand for gas in said cities: Provided, further, that it is the intent of the parties that the provisions of this clause shall not be so con-*

strued as to in effect require the Lessee to lay a line for manufacturing purposes mainly or only" (Rec. 856). (Italics ours.)

The business of the Kansas Natural Gas Company and the Kansas City Gas Company and The Wyandotte County Gas Company with respect to the furnishing of gas and the payment therefor was carried on in conformity with said supply-contracts from the date thereof until Oct. 9, 1912, at which time the United States District Court for the District of Kansas, Hon. John C. Pollock, Judge, appointed Receivers for the Kansas Natural Gas Company in the creditors' suit entitled, John L. McKinney v. Kansas Natural Gas Company, No. 1351, Equity, and later, Feb. 3, 1913, extended said receivership to the foreclosure suit entitled, Fidelity Title and Trust Company v. Kansas Natural Gas Company and Delaware Trust Company, *et al.*, No. 1-X, Equity.

The bills in said suits (Rec. 870, 892) alleged that the Kansas Natural Gas Company had no distributing plants in the cities to be served; that it would cost enormous sums exceeding 20 million dollars to build the same, resulting in duplication of plants and tearing up of the city streets, and (Rec. 873), "That it was for the public good as well as for the mutual benefit of both the Kansas Natural Gas Company and the several manufactured gas companies, that the plants of the latter in each of the said cities be utilized for the distribution and marketing of the natural gas therein, and to that end the Kansas Natural Gas Company contracted with each of the manufactured gas companies in the said several cities by which the Kansas Natural Gas Company should pipe its natural gas to the limits of the said cities and there *deliver the same into the local manufactured gas system or plant*, and that the local manufactured gas company should *there take and receive* the said gas and through and by means of its manufactured gas plant or system of pipes distribute, market and *sell* the same to consumers thereof in the said city."

In the orders of court appointing said Receivers in both cases, it was provided

"Third. That upon the filing and approval of the said bonds, the said Receivers (or each of them as fast as his respective bond is filed and approved) be and they are hereby authorized, empowered and directed to take immediate possession of all and singular the pipe lines, compressor stations, leases and other property above described or referred to, wherever the same may be situate or be found and, *until the further order of this Court, to continue the operation of the present pipe line system and natural gas business of the defendant company and every part or portion thereof, and to run, manage, conduct and operate such pipe lines and property as the defendant company holds, controls or operates under leases, contracts arrangements or otherwise.* All of which is to be done, until the further order of the Court, *as heretofore done, run or operated by the defendant Company; but*

The Court expressly reserves to itself the right to pass upon, approve, disapprove, disavow and cancel any and all leases, arrangements and contracts of every nature, kind and description, under or by virtue of which, the defendant company has been or is now operating any of its leased lines and property; or selling or furnishing any of its gas for distribution and sale; or buying and acquiring any gas for use and transportation through its operated lines; and no such lease, arrangement or contract shall be regarded as binding or taken by the Receivers, until expressly ordered by this Court in these proceedings; and nothing herein contained shall be considered or taken as in any way accepting, approving, satisfying or adopting any such lease, arrangement or contract" (Rec. 789). (Italics ours.)

Said order further directed said Receivers to acquaint themselves with the condition of the company's affairs and to report to the court their "suggestions as to the value of the company's leases and *contracts both for operating lines and furnishing gas to the local distributing companies in the several cities reached by the operated lines of the defendant company, and the advisability of disapproving and disavowing any or all of them"* (Rec. 791-792).

Under this order the Receivers in said creditors' and foreclosure suits took possession and operated the properties owned and leased and the business and contracts of the Kansas Natural Gas Company including said gas-supply-contracts with the local companies from Oct. 9, 1912, until Sept. 22, 1914, at which time the active management of the entire properties of the Kansas Natural Gas Company owned and leased and its business, including said supply-contracts with the local companies, was, by order of court pursuant to the mandate of the Circuit Court of Appeals (Rec. Order 1001), 217 Fed. 187 turned over to Receivers John M. Landon and R. S. Litchfield appointed by the District Court of Montgomery County, Kansas, in the case of *State of Kansas v. Independence Gas Company, et al.*, No. 13476, an anti-trust suit for the correction of certain alleged corporate abuses. This was done on the doctrine of comity and claim of prior jurisdiction in the State Courts (206 Fed., 772; 209 Fed. 300; 217 Fed. 187), but the "potential" possession and right of reversion of said properties was retained in the Federal Court and its Receiver.

The order of the Federal Court directing the delivery of said property and business to the Receivers of the State Court (Rec. 1001) provides for the delivery of the possession of all the estate of the Kansas Natural Gas Company "including the leasehold estates and contracts of and with *The Kansas City Pipe Line Company*" (Rec. 1003) and that the Federal Court "through its Receiver George F. Sharitt shall retain the potential possession of the estates, properties and assets of the Kansas Natural Gas Company, including the leasehold estates and contracts of and with *The Kansas City Pipe Line Company*; but the said John M. Landon and R. S. Litchfield and their successors shall have the right as Receivers to retain the actual possession, control and management of the estates, properties, moneys, funds, assets and earnings of the Kansas Natural Gas Company, including the leasehold estates and contracts of and with *The Kansas City Pipe Line Company*" (Rec. 1003).

The entire property of the Kansas Natural Gas Company owned and leased and its business including said supply contracts with the local companies was in the actual possession and active management of John M. Landon, in the dual capacity as Receiver appointed by said State Court, and as ancillary Receiver appointed by said Federal Court in said foreclosure suit, but acting under the direction of the State Court, from Sept. 22, 1914, to June 2, 1917; and the business was carried on by said Receiver and gas furnished to the Kansas City Gas Company and The Wyandotte County Gas Company in the same manner that it had theretofore been done, run and performed by the company (Rec. Bill, 18; Stat. of Evid. 787, 806).

"The Receivers, however, continued to distribute gas to the various distributing companies, and to collect therefor upon the ratio of the division of rates fixed by the contracts." (Court's Opinion 242 Fed., 674, Rec., 576).

On Dec. 29, 1915, John M. Landon and R. S. Litchfield as Receivers, acting under direction of the State Court commenced this suit, No. 136-N below.

On June 2, 1917, the State Case was dismissed and J. M. Landon was discharged as State Receiver (Rec. 1023) and John M. Landon as Federal Receiver, acting under direction of that court was substituted as plaintiff in said case (Rec., 1029).

On June 3, 1916, a hearing was had before the enlarged court under Sec. 266 of the Judicial Code before Hon. Walter H. Sanborn, Circuit Judge, Hon. Wilbur F. Booth and Hon. Ralph E. Campbell, District Judges, and a temporary injunction was granted enjoining the enforcement of the 28-cent rate fixed by the Kansas Commission as confiscatory, but the court said: "It has not been and is not necessary for this court as at present constituted to determine the validity of the city ordinances, the contracts between the cities and the distributing companies, *contracts between the distributing*

companies and the Kansas Natural Gas Company and the duties and obligations of the Receiver under them in order to adjudge the issues it was constituted to decide and for that reason no opinion is expressed or adjudication made concerning them" (Rec. 311; 234 Fed., 168).

On final hearing the Kansas City Gas Company and The Wyandotte County Gas Company introduced in evidence said natural gas supply-contracts and the franchise-ordinances attached and referred to therein and the lease under which the Kansas Natural Gas Company acquired the use of the pipe-lines and propertis of The Kansas City Pipe Line Company and assumed its obligation to furnish gas under said contracts to the Kansas City Gas Company, The Wyandotte County Gas Company; and also put in evidence the pleadings and records in said creditors' and foreclosure suits including particularly the order above quoted of the United States District Court appointing Receivers and continuing said supply-contracts with the local companies in force and effect until the further order of the court.

The condensed statement of the evidence offered by all the parties appears in the record, pages 776 to 820, inclusive, and may be further condensed as follows:

The Kansas City Gas Company is a Missouri corporation doing business in Kansas City, Missouri (Rec., p. 777); The Wyandotte County Gas Company is a Kansas corporation doing business in Kansas City, Kansas, and Rosedale, Kansas (Rec. 778); The Kansas Natural Gas Company is a Delaware corporation engaged in the business of producing, purchasing, transporting, distributing and selling natural gas (Rec. 778), and is authorized to do business in Kansas; it owns and operates by lease or otherwise a system of pipe-lines from Tulsa, Oklahoma, to Topeka, Lawrence, Atchison and Kansas City, Kansas, in Kansas, and to St. Joseph, Kansas City, Missouri, and Joplin in Missouri (Rec., 778); The Fidelity Title and Trust Company is a Pennsylvania corporation, trustee of its mortgage (Rec. 778) John M. Landon at the commencement of the suit was in pos-

session and control of the property of the Kansas Natural Gas Company owned and leased in all three states and conducting its business under direction of the State Court in *State v. Independence Gas Company et al.*, and was also ancillary Receiver to the foreclosure suit pending in the Federal Court; at the time of final judgment John M. Landon and George F. Sharitt were the duly appointed, qualified and acting Receivers of the Kansas Natural Gas Company by appointment of the Federal Court (Rec. 778); Kansas City, Missouri, is a municipal corporation of said state having a population exceeding 100,000 (Rec. 779); its powers relating to the use of its streets by gas companies are hereafter set out in the margin.

On Sept. 27, 1906, the public authorities of Kansas City, Missouri, passed Ordinance 33887 authorizing the predecessors of the Kansas City Gas Company to use the streets of said city for the furnishing and sale of natural gas; on Nov. 19, 1906, the grantees commenced furnishing and selling natural gas, and ever since said date the said grantees or the Kansas City Gas Company have distributed and sold natural gas at the prices named in said ordinance (Rec. 785).

On Dec. 14, 1904, the public authorities of Kansas City, Kansas, passed Ordinance 6051 authorizing the predecessors of The Wyandotte County Gas Company to use the streets of said city for the furnishing and sale of natural gas; on Aug. 10, 1905, the grantee commenced furnishing and selling natural gas, and ever since said date the grantee or The Wyandotte County Gas Company have furnished and sold natural gas at the prices named in said ordinance (Rec. 785), except from Dec. 10, 1915, to the date of the decree during which time they furnished gas at 28 cents under the Kansas Commission's order.

The other local companies selling natural gas in the various cities and towns occupy the streets of their respective cities under ordinances duly passed by said cities (Rec. 785).

On Nov. 17 and Dec. 3, 1906, McGowan, Small and Morgan, predecessors of the Kansas City Gas Company, entered into written contracts with The Kansas City Pipe Line Company, predecessor of the Kansas Natural Gas Company, providing for the delivery and sale of natural gas by the Kansas Natural Gas Company to the Kansas City Gas Company and the price to be paid therefor (Rec. 786).

The parties conducted the business according to said contracts until the appointment of Receivers, Oct. 9, 1912, and said Receivers "have ever since continued to furnish gas in conformity with the orders of court appointing them and their predecessors, to the Kansas City Gas Company and other companies, and have continued to collect therefor on the ratio of the division of rates fixed by said contracts; and there has been no agreement between the partes hereto or between the Receivers and the Kansas City Gas Company for the modification or cancellation of said contracts, and prior to the final decree in this case there have been no orders entered either by the State Court of Montgomery County or by this court specifically adopting said contracts nor by this court specifically disavowing the same" (Rec. Stat. of Evid., 786, and Bill 43). "The Receivers have continued to distribute gas to the various distributing companies and to collect upon the ratio of the division of rates fixed by the contracts" (Rec. 1103 and 1104; 242 Fed. 674).

On Nov. 19, 1916, the Kansas City Gas Company by leave and order of the Public Service Commission of Missouri put into effect a 30-cent rate in conformity with its contract with the Kansas Natural Gas Company to enable it to pay said Company and its Receiver $62\frac{1}{2}$ per centum of its gross receipts from the sale of gas at 30 cents net per thousand cubic feet as compensation for the gas furnished it by the Kansas Natural Gas Company and its Receivers (Rec. 844).

At the same time (Rec.) The Wyandotte Gas Company put into effect a 30-cent rate without leave or order of the Kansas Commission to conform to its contract with the Kansas Natural Gas Company to pay as consideration for

the gas furnished to it by the Kansas Natural Gas Company 62½ per centum of its gross receipts from the sale of gas at a 30-cent rate on and after Nov. 19, 1916 (Rec. 828).

Similar contracts were made and observed by the parties and Receivers by the other local companies (Rec 786).

On Jan. 1, 1908, the Kansas Natural Gas Company and The Kansas City Pipe Line Company entered into a lease under which the former acquired the use of certain pipelines and properties of the latter, which constitute about 50 per cent. of the main trunk pipe-line system operated by the Receiver (Rec. 936); and the terms of said lease have been observed by the parties until the appointment of Receivers and the Receivers have continued in possession of the properties of The Kansas City Pipe Line Company and operated the system and carried on the business. This is the lease in which the Kansas Natural Gas Company assumes the obligations of said supply-contracts.

On Aug. 10, 1916, the Kansas City Gas Company filed with the Public Service Commission a new schedule of rates for gas and an application for the approval thereof; on Aug. 10, 1916, said commission approved and the Kansas City Gas Company put the same into effect, and has maintained the same until entry of the decree herein; the rate is the same as the rate named in the Ordinance 33887 (Rec. 838), to-wit, 30 cents net per thousand cubic feet (Rec. 787).

On Jan. 5, 1912, the Attorney-General of Kansas commenced an action in *quo warranto* entitled, State of Kansas v. Independence Gas Company, *et al.*, in the District Court of Montgomery County, Kansas (Rec. Stat. of Evid. 787, petition 862).

On Oct. 7, 1912, a second mortgage bondholder commenced a creditor's suit in the court below alleging insolvency entitled, John L. McKinney v. Kansas Natural Gas Company, No. 1351, Equity (Rec. Stat of Evid. 788, petition 870).

On Oct. 9, 1912, Eugene Mackey, president of the company, answered confessing the bill (Rec. 788); on Oct.

9, 1912, Eugene Mackey, Conway F. Holmes and George F. Sharitt were appointed Receivers of the Kansas Natural Gas Company in said creditors' suit; the order of appointment contains the recital as to continuing furnishing gas under said contracts above quoted.

The Receivers were further instructed (Rec. Order 791) to acquaint themselves (Rec. 791) with the company's affairs and report to the court their (Rec. 792) "suggestions as to the value of the company's leases and contracts both for operating lines and furnishing gas to the local distributing companies in the several cities reached by the operated lines of the defendant company and the advisability of disapproving and disavowing any or all of them."

On Oct. 19, 1912, the Fidelity Title and Trust Company, trustee of the first mortgage of the Kansas Natural Gas Company, intervened (Rec. 793) and repeated and adopted all the allegations of the plaintiff's bill and prayed for the same relief; on the same date the court entered an order (Rec. 793) making said trustee party plaintiff (Rec. 793) and extending the receivership on to said trustee.

On Oct. 19, 1912, Eugene Mackey, president, and C. S. James, secretary of the Kansas Natural Gas Company answered (Rec. 794) confessing the trustee's bill.

The Receivers duly qualified, took possession of said properties and business of the Kansas Natural and thereafter operated the same under said order of court (Rec. 794).

On Feb. 3, 1913, the trustee of the first mortgage of the Kansas Natural, commenced a foreclosure suit in the court below entitled, Fidelity Title and Trust Company v. Kansas Natural Gas Company, No. 1-N, Equity, alleging default in interest payments on the mortgage bonds, praying the appointment of Receivers and foreclosure of said mortgage; on the same day the Kansas Natural Gas Company confessed this bill, and the court extended the receivership in the McKinney case to the foreclosure suit (Rec. 794).

On Feb. 15, 1913, the State Court entered judgment in

State of Kansas v. Independence Gas Company, et al., adjudging the Kansas Natural Gas Company, the Independence Gas Company and the Consolidated Gas, Oil and Manufacturing Company a combination in restraint of trade in violation of the anti-trust laws of Kansas and appointed Receivers therefor under the statute of Kansas to correct the abuses complained of (Rec. 794).

On Feb. 18, 1913, the Attorney-General of Kansas filed a petition in *John L. McKinney v. Kansas Natural Gas Company*, No. 1351 alleging the prior jurisdiction of the State Court and praying for the possession of the properties of the Kansas Natural Gas Company.

On March 24, 1913, The Kansas City Pipe Line Company intervened in the foreclosure suit demanding the payment of certain pipe-line rentals, said intervening petition is still pending in said cause undisposed of (Rec. 804).

On June 5, 1913, Hon. J. A. Marshall, Judge assigned to said case, sustained (206 Fed. 772) the petition of the Attorney-General of Kansas and ordered the delivery of the properties within the State of Kansas to the State Receivers; on Nov. 4, 1913, the United States Circuit Court of Appeals affirmed said order (209 Fed., 300).

On Dec. 23, 1913 (Rec. 1006) the Attorney-General of Kansas filed a further motion in the McKinney case for the surrender to the State Receivers of all moneys in the hands of the Federal Receivers accumulated during the Federal receivership and asked the surrender of all properties of the Kansas Natural Gas Company owned and leased in Kansas, Missouri and Oklahoma (Rec. 804).

On Jan. 24, 1914, (Rec. 997) the Federal Court, Hon. Smith McPherson, Judge, sustained said motion and ordered the delivery of all moneys and properties in the hands of the Federal Receivers to the State Court Receivers (Rec. 805).

The Circuit Court of Appeals after modifying said order protecting the rights of The Kansas City Pipe Line Company, affirmed the same (Rec. 805; 217 Fed. 187-196).

On Sept. 22, 1914, the Federal Court entered an order

delivering to the State Receivers all the properties of the Kansas Natural Gas Company owned and leased in Kansas, Missouri and Oklahoma and all the moneys accumulated during the Federal receivership for the purpose of enabling said court to execute its decree thereon, but retained jurisdiction in the foreclosure suit and the "potential" possession of the property through its Receiver George F. Sharitt, the others having resigned, and provided for the return of said property to the Federal Court and its Receivers at the end of the State receivership (Rec. 806; Order 1001).

On Dec. 29, 1914, certain parties filed a stipulation in said State Case known as the "creditors' agreement" providing for the distribution of earnings of said property during the State receivership and the preservation of the *statu quo* of all the parties until said properties were returned to the Federal Court (Rec. 1016, paragraph 12).

On Jan. 9, 1915, John M. Landon and R. S. Litchfield were appointed ancillary Receivers in the McKinney and foreclosure suits (Rec. 805; Order 1018).

In Jan., 1913, (Rec. 1081) the Receivers applied to the Public Utilities Commission of Kansas for an increase in rates. An extended hearing and rehearing were had thereon (Rec. 54) resulting in an order (Rec. 83) fixing what is known as the 28-cent rate; thereupon said Receivers filed with the commission a schedule of rates (Rec. 84) for all gas furnished by them and sold by distributing companies, increasing the rates from 25 to 28 cents net (Rec. 85 and 86). A statement of said proceedings and the evidence thereon is found in the record pages 298 to 307 (234 Fed. 157-165) and 1081 to 1086.

During 1914, '15 and '16 the Public Service Commission of Missouri suspended certain schedules of natural gas rates filed by local companies, first for 120 days and then for 6 months and thereupon allowed the same to go into effect automatically without hearings. Said commission claims the right and threatens to fix and regulate rates of local gas companies doing business in Missouri and claims jurisdic-

tion over the distribution and sale of natural gas in Missouri by the Kansas Natural Gas Company and its Receivers and claims the right and threatens to fix and regulate the price to be paid for natural gas by the local companies doing business in Missouri to the Kansas Natural Gas Company or its Receiver (Rec. 805).

Neither the Kansas Natural Gas Company nor its Receivers have, own or hold any franchises, rights or licenses to occupy or use the streets of Kansas City, Missouri, or Kansas City, Kansas, or Rosedale, Kansas, or any of the other principal cities involved (Rec. 806).

Neither said company nor its Receivers have, own or hold any interest in any of the local companies' properties, doing business in the cities of Kansas or Missouri (Rec. 806).

The Receivers have continued to operate the pipeline system and the natural gas business of the Kansas Natural Gas Company under the direction of the State and Federal Courts and to run, manage, conduct and operate said properties and business in substantially the same manner in so far as the transportation, distribution and sale of gas is concerned as the same was done, run and operated by the Kansas Natural Gas Company prior to their appointment (Rec. 806). The Kansas City Gas Company and The Wyandotte County Gas Company refused to put in force and effect the rate named by the Receivers under the direction of the State Court on or about Sept. 1, 1916; thereupon the Receiver billed said local companies at the rate of 18 cents per thousand cubic feet for the gas delivered to said distributing company at their city gates, which bills are now being contested in the foreclosure suit pending below. The order of the State Court approving the aforesaid rates fixed by the State Receiver Sept. 1, 1916, was reviewed by the Supreme Court of Kansas in *State v. Independence Gas Company et al.*, 172 Pac. 713; Kan., where it is held that the courts of the state have no jurisdiction to appoint Receivers for the

purpose of regulating rates of public utilities and that neither the court nor the Receiver has jurisdiction to change rates without the consent of the Public Utilities Commission and that the court did not cancel the supply-contracts existing between the Wyandotte Company and the Kansas Natural and its Receiver and had no jurisdiction to cancel the same, and that "neither the court nor the receiver could compel that company to receive gas at any price other than the one named in the contract between the Wyandotte County Gas Company and the Kansas Natural Gas Company." 172 Pac. 715.

The Receiver continued to deliver the gas to the Kansas City Gas Company and The Wyandotte County Gas Company and said companies continued to pay therefor according to the price fixed by said supply-contracts (Rec. 507-518).

The Receivers are now operating the pipe-line system described in the bill (Rec. 8) and in the intervening petition of The Kansas City Pipe Line Company, case No. 1351 (Rec. 937, map 948), including all the pipe-lines of The Kansas City Pipe Line Company held under said lease in which said Kansas Natural assumed the obligations of said supply-contracts.

None of the natural gas furnished by the Receiver is produced in Missouri, not exceeding 6 per cent. thereof is produced in Kansas, the balance is produced in Oklahoma. Approximately 44 per cent. is sold in Kansas and 56 per cent. in Missouri (Rec. 807).

When the Receivers were appointed Oct. 9, 1912, the outstanding bonded indebtedness of the Kansas Natural and its subsidiary companies The Kansas City Pipe Line Company and Marnett Mining Company was \$7,177,000, of which there has been paid in cash out of earnings during the receiverships \$2,807,200, leaving a balance of \$4,369,800, of which balance \$1,364,750 has been compromised and satisfied by the operation of the "creditor's agreement"

leaving a balance of outstanding bonded indebtedness as of July 10, 1917, of only \$3,005,050 (Rec. 807).

Said company has no general or unsecured creditors and no receivers' certificates have been issued and the Receivers have used the current income for working capital, operating expenses, payment of interest, extension of lines and retirement of said bonds and interest (Rec. 807).

The value of the properties operated by the Receiver is between \$8,000,000 and \$14,000,000 (Rec. 807).

During the proceedings, Henry L. Doherty and Company of 60 Wall Street, New York, have purchased substantially all the stock and bonds of said company and its subsidiaries (Rec. 808).

The production, transportation, distribution and sale of natural gas was and is accomplished in the following manner: The Kansas Natural Gas Company and its Receivers acquire the gas by drilling, purchase and otherwise in southern Kansas and in Oklahoma and collect it in pipe-lines. The gas is caused to flow from the wells into the gathering lines of the company by the force of "rock pressures" which are the pressures at which gas is found in place in the earth, varying from 15 to 500 pounds per square inch. These initial pressures carry the gas along the pipe-lines for some distance and then the pressures become lower and in order to carry the gas further it is necessary to compress it to approximately 300 pounds per square inch. Emerging from the compressors it flows along the pipe-lines towards the next compressor where it is again compressed and sent forward, which process continues until the gas reaches the distributing system or gas holders of the Kansas City Gas Company and other local gas companies. The whole process is merely the application of the law of flowing gases from a given pressure or density to a lower pressure or density (Rec. 809).

There is a permanent physical connection between the pipe-lines operated by the Kansas Natural and Receiver

and the distribution mains of the local companies at or near the corporate limits of the various cities, through which the gas passes from the pipe-line system into the distributing station (Rec. 809-810)

Gas is constantly moving from the wells into the gathering mains and along the pipe-line system, night and day; and the compressors are constantly at work compressing gas into the trunk pipe-line system. During the night and certain hours of the day and during certain warm days more gas passes into and is compressed into the pipe-line system than is being taken out for use. The amount of gas in the pipe-line system at any particular time depends upon pressure and is proportional to absolute or atmospheric pressure, 14.4 degrees plus the mechanical pressures. The process of filling the lines in excess of demand during the night time and on warm days and certain hours of the day is called "packing the lines." The pipe-line system constitutes not only a transportation system, but a great storage reservoir by means of this packing of the lines; the storage capacity of the Kansas Natural lines from Grabham, Kansas, to Kansas City, Missouri, amounts to 12 or 14 million cubic feet (Rec. 810 and 812) in addition to their carrying capacity; both the carrying capacity and storage capacity of the system are necessary for the proper supply of gas by the Kansas Natural and its Receiver to the Kansas City Gas Company and other local companies. If it were not for the storage capacity of the Kansas Natural lines that company and its Receiver would not be able to supply the instantaneous demands of the consumers made upon the Kansas City Gas Company at times when the demands are greatest for the reason that such instantaneous demands at maximum-demand-hours of the day always exceed the carrying capacity of the lines and the storage capacity must be drawn upon. All gas is in constant motion and even if isolated in a holder it cannot be held still; that is, the nature of

gas is constant molecular motion. There is a constant movement of gas in the pipe lines, the general direction of which is from the gas sands of the wells towards the consumers' appliances. Gas, unlike solids, oils and other liquids, can be greatly compressed (Rec. 810). At times when the line is operated at its fullest capacity the gas will move at greater velocity than the fastest express train. (We omit the conclusions of law of the expert witness, S. S. Wyer, such as, there is no legal delivery of the gas until it has passed through the consumers' meters and burst into flame at the burner tips) (Rec. 811). This witness for plaintiff testified (Rec. 812):

"Q. Mr. Wyer, assuming that the natural gas lines are full of gas and that the lines of the distributing system are full of gas and the consumer's house pipings are connected, how long after the consumer decides to buy a thousand feet of gas does he get it?

A. He gets it *instantly*, that is, if the service is operating and the gas is going. He gets it by simply turning a cock.

Q. He gets it instantly?

A. Yes, sir" (Rec. 812-13).

The statement of the evidence continues:

66. The gas passes into the mains of the distributing plant of the Kansas City Gas Company at 25th Street in Kansas City, Missouri, about 600 feet east of the Missouri-Kansas state line and at 39th Street in Kansas City, Missouri, about one foot east of the said state line. After the gas enters the mains of the Kansas City Gas Company, that company has the actual physical possession and complete control over it and over its distribution and sale. After reaching the main system of the Kansas City Gas Company, the gas is passed through governor stations which reduce its pressure to a uniform pressure of about 8 inches water column, necessary for convenience and safety in distribution and sale. No gas is ever returned from

the Kansas City Gas Company to the Kansas Natural Gas Company (Rec. 813).

67. When a surplus of gas is available in the lines of the Kansas Natural Gas Company, the Kansas City Gas Company fills its own gas holders, having a capacity of 7,000,000 cubic feet, from the mains, and holds this gas in storage until such time as the Kansas Natural Gas Company cannot deliver enough gas to supply the demand, at which time the gas in the holders is pumped by the Kansas City Gas Company through its mains into its governor stations, and thence into and through its low pressure distributing system to its consumers. The period during which the gas remains in the holders thus stored, varies from a few hours to several days or weeks, according to the demand and supply. During the present hearing of this case, gas has thus been used from the holders in Kansas City, Mo. (Rec. 813).

68. Nearly half the gas distributed by the Kansas City Gas Company in June, 1917, went into the holders and was pumped out again by the Kansas City Gas Company. The holders were used during every month of the year 1917 up to the time of the hearing of this case (July). The storage holders are not a necessary part of the pipeline system for the transportation of gas from the Kansas Natural wells to the consumers. When the gas comes from the holders of the Kansas City Gas Company it has to be compressed by that company in order to put it through the mains (Rec. 813).

69. A consumer in Kansas City, Mo., who wishes to procure natural gas makes written application therefor to the Kansas City Gas Company and complies with certain reasonable rules prescribed by that Company. If accepted within a few hours or within a day or two, according to circumstances, the gas is turned on for the consumer by the Kansas City Gas Company. The consumers' meters are read, bills made and presented to them and,

if not paid, gas is turned off, all by the Kansas City Gas Company without consultation with the Kansas Natural Gas Company or with its Receivers (Rec. 814).

70. The "consumer's meter" belongs to the Kansas City Gas Company and is generally located in the cellar or basement of the consumer's premises. The consumer is charged by the Kansas City Gas Company for all gas that passes through that meter whether it reaches the burner tip or not, and the consumer is required to pay for it except only in the event that he is insolvent and cannot be made to pay. If, after gas passes the consumer's meter, any of it escapes through leaks in the consumer's pipes, the consumer must pay for it (Rec. 814).

71. The consumer receives gas for approximately thirty days before his meter is read. Ten days thereafter he is presented with a bill (Exhibit 1015) and ten days thereafter he makes payment therefor in cash or by check, to the Kansas City Gas Company at 910 Grand Avenue, Kansas City, Missouri (Rec. 814).

72. The Kansas City Gas Company exercises its own judgment and discretion as to extending credit to consumers, without consultation with the Kansas Natural Gas Company or its Receivers (Transcript, p. 81). It requires a cash deposit from some; it accepts guarantees from others and those having credit it supplies without either deposit or guarantee. It discontinues the supply of gas to consumers who default in payment of bills for a certain period of time and for certain other violations of its rules and regulations according to its own discretion (Rec. 814).

73. There are no relations or dealings between the consumer in Kansas City, Missouri, and the Kansas Natural Gas Company or its Receivers or between the City of Kansas City, Mo., and the Kansas Natural Gas Company or its Receivers, except such, if any, as might be construed to arise or to be created by operation of law from

the terms of said supply-contracts and franchise-ordinances and the course of dealing herein stated or any or all of the same (Rec. 814).

74. The Kansas City Gas Company does not forward to the Kansas Natural Gas Company any list of the names of consumers or the amount of gas required by all or any of them at any future time. The Kansas City Gas Company has paid to the Kansas Natural Gas Company, or its Receivers $6\frac{1}{2}$ per cent of its gross receipts from the sale of gas. When bills were not collectible the amount of such bills was not figured in determining the payment due the Kansas Natural Gas Company or Receivers. It has been the practice for the Kansas City Gas Company to furnish the Kansas Natural Gas Company or Receivers annually a list of the names and amount due from delinquent consumers; and if later they paid their bills the names of such consumers thus paying, were furnished to the Kansas Natural Gas Company, to enable that company to check up the two lists and thus determine whether or not it was receiving the amount due it (Rec. 815).

75. Payments by the Kansas City Gas Company and The Wyandotte County Gas Company to the Kansas Natural Gas Company and Receivers have been made on the 15th day of each month for the gas sold to consumers and collected for prior to about the tenth day of the preceding month. Since September 1, 1916, the Receiver has rendered bills to The Wyandotte County Gas Company and the Kansas City Gas Company for gas claimed to have been delivered by the Receiver at the points of connection at or near the city limits, between the mains of The Wyandotte County Gas Company and the Kansas City Gas Company and pipe-line system operated by the Receiver, and the Kansas City Gas Company, and The Wyandotte County Gas Company have not paid said bills, but has paid on the basis of the supply-contracts and the Receiver

is now prosecuting claims against said companies for gas on the basis of measurements and deliveries at the city limits, as shown by the allegations and exhibits to plaintiff's supplemental bill and the Kansas City Gas Company's and The Wyandotte County Gas Company's answers and amended and supplemental answers on file (Rec. 815).

76. The Kansas City Gas Company and The Wyandotte County Gas Company have carried on their business in substantially the same manner in all material respects and have pursued the same course in their dealings, transactions and communications to and with the Kansas Natural Gas Company, the Receivers and their respective consumers (Rec. 815).

77. The demands of the consumers of the Kansas City Gas Company during the summer months are approximately 10,000,000 cubic feet per day and during the winter months for lighting and cooking approximately 13,000,000 cubic feet per day and for all purposes, if demands were met, approximately 70,000,000 cubic feet per day. During the winter of 1916-17 the greatest available supply on maximum-demand-days for Kansas City, Missouri, was 12,000,000 cubic feet for all purposes (Rec. 815).

78. The rates charged by the Kansas City Gas Company and paid by its consumers prior to November 19, 1916, and at all times thereafter up to the time of the fixing of a rate by Judge Booth were those named in Ordinance No. 33887 of Kansas City, Missouri (Exhibit 1009) (Rec. 815).

The St. Joseph Gas Company maintains and operates a manufactured gas plant and supplements the natural gas supply with artificial gas, the gas being mixed in the holder and sold by the local company at a rate depending upon the proportion of the two gases furnished (Rec. 816).

The Kansas City Gas Company has filed with the Public Service Commission of Missouri a petition for authority to supplement natural gas with manufactured gas and fix the price therefor (Rec. 816, Petition 1030).

The foregoing statement as to the manner of the transportation, distribution and sale of natural gas applies in all substantial respects to the cities (Rec. 816).

This suit No. 136-N is alleged to be ancillary to the suit of *John L. McKinney v. Kansas Natural Gas Company*, No. 1351, and *Fidelity Title & Trust Company v. Kansas Natural Gas Company*, No. 1-N, pending in the court below and was commenced on the 29th day of December, 1915, and chancery subpoenas were issued on the application of plaintiff, not only against the defendants residing in Kansas but also against Kansas City, Missouri, Public Service Commission of Missouri, its members and attorney, Attorney-General of Missouri, Kansas City Gas Company and other cities and local gas companies in Missouri. Said service being made outside of the State of Kansas and within the State of Missouri, as shown by the Marshal's returns (Rec. 816; 94 to 99).

These appellants among other Missouri defendants moved to quash said service outside of the State of Kansas for want of jurisdiction in said court which was overruled (Rec. 570).

On June 3, 1916, a temporary injunction was issued by the enlarged court under Sec. 266 of the Judicial Code, Hon. Walter H. Sanborn, Circuit Judge, Hon. Ralph E. Campbell and Hon. Wilbur F. Booth, District Judge, sitting, temporarily enjoining the enforcement of the Kansas 28-cent rate as confiscatory and declining to pass upon the other matter involved.

On July 5, 1917, the court entered a decree against the "Kansas defendants" permanently enjoining the enforcement of the 28-cent rate as confiscatory and an interference with and burden upon interstate commerce (Rec. 600), and reserving jurisdiction over the Missouri defendants and the other matters involved in the suit for future determination. Case No. 277 in this court is an appeal by the Kansas Commission from that order.

On Aug. 13, 1917, the court entered its final decree (Rec. 621) herein granting all the relief prayed by the Receiver, John M. Landon, and substantially all the relief prayed by the defendant, Kansas Natural Company, whose answer adopted the allegations of the bill and joined the plaintiff's prayer for the same relief, including an injunction against these appellants, Kansas City Gas Company and The Wyandotte County Gas Company, putting into force and effect or collecting any rates or schedule of rates except such as was then or might thereafter be approved by the trial court. The other cases, Nos. 329, 330, 353, in this court are separate appeals from this final decree.

At the same time, Aug. 13, 1917, the court entered an order (Rec. 1068) in the foreclosure suit, *Fidelity Title & Trust Company v. Kansas Natural Gas Company*, No. 1-N consolidated with No. 1351, approving rates recommended by the Receiver to be charged by the distributing companies including appellants, the Kansas City Gas Company and The Wyandotte County Gas Company, at 60 cents net per thousand cubic feet (Rec. 1069) and requiring the payment of 57½% of said companies' receipts to said Receiver as consideration for the gas furnished (Rec. 1070). This was an *ex parte* hearing in which these appellants were not parties and had no day in court or opportunity to be heard but they appeared and protested and objected (Rec. 1071).

ASSIGNMENT OF ERRORS BY KANSAS CITY GAS COMPANY.

The Kansas City Gas Company assigned the following errors (Rec. 707):

Assignment No. 1. The Court erred in holding, adjudging and decreeing that the business transacted by the Kansas City Gas Company, to-wit, the distribution and sale of natural gas in Kansas City, Missouri, furnished to it by the Kansas Natural Gas Company and its Receivers, John M. Landon and George F. Sharitt is interstate commerce of a national character and not of a local nature, and enjoining said Kansas City Gas Company from interfering with said Kansas Natural Gas Company and its Receivers establishing and maintaining without the consent and over the objection of the Kansas City Gas Company, natural gas rates approved by the Court for the patrons and consumers of the Kansas City Gas Company in Kansas City, Missouri, as appears from paragraphs "second", "seventh", "ninth" and "tenth" of its Decree entered August 13, 1917, for the following reasons, to-wit:

(a) The Kansas City Gas Company is a Missouri corporation, chartered to do a local public utility service in Kansas City, Missouri, and is doing a business affected with a local public interest under franchises granted by the State of Missouri and its municipalities granting the use of the public streets of said City for such purpose.

(b) The Kansas City Gas Company has purchased its supply of natural gas from the Kansas Natural Gas Company or its Receivers since 1906 under and pursuant to written contracts dated November 17th and December 3rd,

1906, fixing the price that the Kansas City Gas Company should pay said Kansas Natural Gas Company, its successors and assigns, for said gas.

(c) There has been no agreement between the Kansas City Gas Company and the Kansas Natural Gas Company or its Receivers providing for any alteration, modification, change, rescission or cancellation of that contract.

(d) The Kansas Natural Gas Company and its Receivers have no franchise to furnish, sell or distribute gas in Kansas City, Missouri, and no right to lay and maintain pipes in its streets and have, own or control no pipes in said City.

(e) The Kansas Natural Gas Company and its Receivers have no right contractual, legal or equitable, to establish and maintain rates for the Kansas City Gas Company, without its consent, to be charged by said Company for gas sold to its consumers in Kansas City, Missouri.

Assignment No. 2. The Court erred in holding, adjudging and decreeing that the business transacted by the Kansas Natural Gas Company and its Receivers, to-wit, the transportation of natural gas from Kansas and Oklahoma to Missouri and the distribution and sale of said gas in said state by said Kansas Natural Gas Company and its Receivers, is interstate commerce of a national character and not of a local nature, and enjoining the Kansas City Gas Company from interfering with said Kansas Natural Gas Company and its Receivers establishing and maintaining over the objection of the Kansas City Gas Company, natural gas rates approved by the Court for the patrons and consumers of the Kansas City Gas Company in Kansas City, Missouri, as appears from paragraphs "second", "seventh", "ninth", and "tenth" of its Decree entered August 13, 1917; for the following reasons, to-wit:

(a) The Kansas Natural Gas Company and its Receivers are doing a business affected with a public interest; their participation or interest, if any, in the distribution and sale of natural gas in Kansas City, Missouri, is a local public utility service of and for the State of Missouri.

(b) Said Kansas Natural Gas Company and its Receivers have no franchise upon the public streets of Kansas City, Missouri, but deliver, market and sell their natural gas by and through the instrumentality of the Kansas City Gas Company, which is a licensed agency of the State of Missouri and a public utility corporation under its laws and rendering a local public service under franchise duly granted by the State and its municipalities, by reason of which said Kansas Natural Gas Company and its Receivers have devoted their property and natural gas to the public use of the State of Missouri and submitted to state regulation and control thereof.

(c) The Kansas Natural Gas Company and its Receivers have voluntarily made and maintained physical connections between their pipe-lines and the distribution plant of the Kansas City Gas Company and aid and contribute to the local public service rendered by the Kansas City Gas Company and thereby submitted to state regulation and control.

(d) The Kansas Natural Gas Company and its Receivers have since 1906 furnished gas to the Kansas City Gas Company under contracts voluntarily entered into and assumed providing for a supply of gas by the former to the latter at certain specified prices and thereby aid and contribute to the local public service rendered by the Kansas City Gas Company and submitted to state regulation and control.

(e) The Kansas Natural Gas Company and its Receivers cannot change or modify those contracts and establish and maintain natural gas rates to the consumers of the Kansas City Gas Company without the consent of said Company.

(f) The purchase of gas by consumers, the sale of gas to consumers and the delivery of gas to consumers are all local transactions between the consumer and the Kansas City Gas Company, made, done and consummated locally.

(g) The purchase of gas by the Kansas City Gas Company and the sale of gas by the Kansas Natural Gas Company or Receivers to the Kansas City Gas Company and the delivery of gas to said latter Company are local transactions between the Kansas City Gas Company and said Kansas Natural Gas Company and its Receivers, done and performed in the State of Missouri.

(h) When a consumer elects or determines to buy gas, delivery is made to him instantaneously out of the stock on hand stored in the pipes of the Kansas City Gas Company in the State of Missouri.

(i) The maintenance of service pipes on the consumer's premises filled with gas and a meter to record the measurement thereof, constitute an implied standing offer to sell, measure and deliver locally on the consumer's premises at a reasonable, customary or authorized price; the turning of the gas cock by the consumer constitutes an acceptance of that offer and the receipt of the gas on the premises locally and a promise to pay a reasonable, customary or authorized price.

(j) There is no contractual relation existing between the consumer and the Kansas Natural Gas Company or Receivers. The consumer deals exclusively with the Kansas City Gas Company. The consumer gives no advance orders for gas to be delivered in the future, but takes gas instantaneously from the pipe extending into his premises according to his needs from time to time.

(k) The Kansas Natural Gas Company and Receivers are more than carriers; they are local merchants or dealers constantly offering gas for sale locally and for delivery locally in Missouri to the Kansas City Gas Com-

pany. The price as between the Kansas City Gas Company and the Kansas Natural Gas Company or Receivers is fixed by contract or must hereafter be fixed by contract.

(l) The contracts between the Kansas Natural Gas Company and the Kansas City Gas Company under which the business was commenced in 1906, and under which the Receivers have long continued to operate, obligate the Kansas Natural Gas Company and its successors "to supply gas" and "to furnish gas" at Kansas City in the State of Missouri to the Kansas City Gas Company. Transportation was and is merely incident to that undertaking. It was and is a necessity to the business of "furnishing" and "supplying" gas. It is wholly immaterial as between the parties where the gas is found, produced or obtained, whether in Missouri, Kansas, Oklahoma, Texas or Louisiana. The obligation undertaken and the course of business of the Kansas Natural Gas Company and its Receivers always was, is and ever must be to "furnish" and "supply" gas to the Kansas City Gas Company at Kansas City in the State of Missouri.

(m) The Kansas City Gas Company has dedicated its properties to a local public use and engaged in a business affected with a local public interest, and undertaken to perform a service to which the general public may resort at will and receive instantaneous, uniform and equal service without discrimination at a uniform, reasonable and compensatory and authorized rate.

(n) The Kansas Natural Gas Company and Receivers have voluntarily devoted their pipe-lines and their natural gas in aid of the local public service performed by the Kansas City Gas Company and *pro tanto* have consented and submitted to state regulation and control.

Assignment No. 3. The Court erred in holding, adjudging and decreeing that the following described gas-supply-contracts existing between the Kansas Natural Gas Company

and the Kansas City Gas Company are not binding upon the Receivers, John M. Landon and George F. Sharitt, and permanently enjoining the Kansas City Gas Company from enforcing the said supply-contracts or rates fixed or referred to therein against said Receivers, to-wit, the contract dated November 17, 1906, between McGowan, Small and Morgan, grantees, predecessors of the Kansas City Gas Company; and The Kansas City Pipe Line Company, which was assumed by the Kaw Gas Company, predecessors of the Kansas Natural Gas Company by lease dated November 19, 1906, between said Kaw Gas Company and the Kansas City Pipe Line Company; and the contract dated December 3, 1906, between said McGowan, Small and Morgan and said The Kansas City Pipe Line Company which was assumed by said Kaw Gas Company by agreement dated December 5, 1906, both of which contracts dated November 17, 1906, and December 3, 1906, respectively, were further assumed by the Kansas Natural Gas Company under the lease dated January 1, 1908, between the Kansas Natural Gas Company and The Kansas City Pipe Line Company, as appears in paragraph "fifth" sub-division 1, and paragraph "seventh" of said Decree entered August 13, 1917, for the following reasons, to-wit:

(a) That said supply-contracts, among other things, provide and obligate the Kansas City Pipe Line Company and its successors and assigns, the Kansas Natural Gas Company and said Receivers, to supply and deliver to the Kansas City Gas Company at a pressure of 20 pounds at the point of delivery at Kansas City, Missouri, natural gas in such amount as will at all times fully supply the demand for all purposes of consumption for the consideration, at this time, of $62\frac{1}{2}$ per cent of the gross receipts from the sale of such natural gas at the specified rate of 30 cents net per thousand cubic feet, thereby securing to the Kansas City Gas Company a supply of gas at $62\frac{1}{2}$ per cent of 30 cents

of $18\frac{3}{4}$ cents, measured at the consumers' meters; that the rate in force at the time of entering the foregoing Decree was 30 cents per thousand cubic feet and the Kansas City Gas Company was paying and had been paying to said Kansas Natural Gas Company and Receivers said agreed consideration, to-wit, $18\frac{3}{4}$ cents per thousand cubic feet, for said gas, according to the terms and provisions of said contracts; that the order above complained of deprives the Kansas City Gas Company of the benefits of said contracts without a hearing on the validity of said contracts and without any showing that the disapproval, disavowal or cancellation of said contracts is necessary, equitable or proper in the interest of prior contracting parties, lienholders and creditors of the Kansas Natural Gas Company and was made in a proceeding collateral to the case of *Fidelity Title & Trust Company v. Kansas Natural Gas Company, et al.*, No. 1-N, Equity, pending in said Court, the same being the receivership and foreclosure suit in which such administrative order alone could legally be made.

(b) The Court had no jurisdiction under the pleadings filed and the issues joined in the above entitled cause and the evidence offered to make said order for the reason that said suit was an action *in personam* and not an action *in rem* and John M. Landon and George F. Sharitt were not Receivers or in possession of any property by virtue of the above entitled case but were plaintiffs in an independent action and were not entitled to administrative orders affecting the property in their possession or the rights and liabilities of third parties with reference to said property or the legal or equitable owners thereof.

(c) Plaintiffs' petition and supplemental petition and the evidence offered on the trial do not state or show facts sufficient to constitute a cause of action in favor of plaintiffs John M. Landon and George F. Sharitt and against this defendant the Kansas City Gas Company entitling said plaintiffs to such relief, to-wit, the disapproval, dis-

avowal and cancellation of said supply-contracts by said Receivers or the Court in the interest of creditors or lienholders. The pleadings and record show that the Kansas Natural Gas Company is perfectly solvent, that its assets exceed \$7,000,000 and its total liabilities are approximately \$3,050,000; and that the claim of the plaintiff in the case of *Fidelity Title & Trust Company v. Kansas Natural Gas Company, et al.*, No. 1-N, Equity, upon which the above entitled cause No. 136-N, Equity, is dependent, is approximately \$350,000; and that no creditors, secured or unsecured, had intervened in the above entitled cause No. 136-N praying the Court to disavow and cancel said contracts in the interest of creditors or lienholders.

(d) That no order disavowing or cancelling said supply-contracts had ever been entered in the case of *Fidelity Title & Trust Company v. Kansas Natural Gas Company, et al.*, No. 1-N, Equity, the foreclosure case upon which this cause is dependent; and the Kansas City Gas Company had never been cited or brought before said court in said cause No. 1-N, Equity, on any application to disavow and cancel said contracts; but on the contrary the Receivers John M. Landon and George F. Sharitt and their predecessors in possession of said property, George F. Sharitt, Conway F. Holmes and Eugene Mackay, had continued to carry on the business of the Kansas Natural Gas Company under and pursuant to the terms and provisions of said contracts since their original appointment on October 9, 1912.

(e) That the order originally appointing said receivers or their predecessors in said cause No. 1-N, Equity, continued said contracts, among others, in full force and effect until the further order of the court in said cause No. 1-N, Equity, by providing and ordering as follows:

“Third. That upon the filing and approval of the said bonds, the said Receivers (or each of them as fast as his respective bond is filed and approved) be

and they are hereby authorized, empowered and directed to take immediate possession of all and singular the pipe lines, compressor stations, leases and other property above described or referred to, wherever the same may be situate or be found and, until the further order of this Court, to continue the operation of the present pipe line system and natural gas business of the defendant company and every part or portion thereof, and to run, manage, conduct and operate such pipe lines and property as the defendant company holds, controls or operates under leases, contracts arrangements or otherwise. All of which is to be done, until the further order of the Court, as heretofore done, run or operated by the defendant Company;''.

(f) That no order has ever been entered in said cause No. 1-N, Equity, disapproving, disavowing or cancelling said contracts or either of them; that said Receivers have continued to carry on the business of the Kansas Natural Gas Company and deliver gas to the Kansas City Gas Company under said contracts and arrangements and have done, run and operated the business of said defendant company as done, run and operated by said company prior to their appointment in reference to the supply of gas to the Kansas City Gas Company; and said Kansas City Gas Company has never been cited or summoned to appear in said court and cause upon any application to change, modify, disapprove, disavow or cancel said contracts or either of them.

(g) That said contracts were originally executed by The Kansas City Pipe Line Company and later assumed by the Kaw Gas Company, predecessors of the Kansas Natural Gas Company, and later assumed and their obligations undertaken by the Kansas Natural Gas Company under a certain lease dated January 1, 1908, under which the Kansas Natural Gas Company and its Receivers now hold all the properties and pipe-lines of The Kansas City Pipe Line Company constituting approximately 50 per cent

of the main trunk pipe-line system now operated by said Kansas Natural Gas Company and its Receivers; and said The Kansas City Pipe Line Company is perfectly solvent and has no creditors demanding the disapproval, disavowal and cancellation of said gas-supply-contracts.

(h) Neither the Kansas Natural Gas Company nor its Receivers are entitled in law or in equity to the injunction and decree above complained of enjoining the Kansas City Gas Company from enforcing said gas-supply-contracts against said Kansas Natural Gas Company and Receivers upon any alleged or assumed Federal constitutional right to engage in interstate commerce for the reason that their right to sell and market natural gas to the Kansas City Gas Company direct or by the use of the Kansas City Gas Company's distribution plant to the ultimate consumers is a matter of private contract between the Kansas City Gas Company and said Kansas Natural Gas Company and Receivers and the relation cannot be created nor maintained by injunctions and decrees.

(i) Neither the Kansas City Gas Company nor its Receivers are entitled in law or in equity to the injunction and decree above complained of enjoining the Kansas City Gas Company from enforcing said gas-supply-contracts against said Kansas Natural Gas Company and Receivers and authorizing said Receivers to establish and maintain other and different rates for the consumers of the Kansas City Gas Company without its consent upon any alleged or assumed Federal constitutional right to due process of law or just compensation for the reason that the compensation paid to the Kansas Natural Gas Company and its Receivers for said gas is fixed and determined by said supply-contracts voluntarily entered into and said contracts may not be changed or modified and other rates and compensation for said gas established and enforced by said Receivers without the consent of the Kansas City Gas Company.

Assignment No. 4. The Court erred in holding, adjudging and decreeing that the performance by the Kansas Natural Gas Company and its Receivers of certain contracts described in paragraph "fifth", sub-paragraph 2, of its Decree entered on August 13, 1917, and the enforcement of said contracts by the Kansas City Gas Company against said Kansas Natural Gas Company and its Receivers constituted an invasion or denial of the right of the Kansas Natural Gas Company and its Receivers to engage in interstate commerce and resulted in the confiscation of the property of said Kansas Natural Gas Company and Receivers in violation of the Federal Constitution.

Assignment No. 5. The Court erred in holding, adjudging and decreeing that the order of the Public Service Commission of Missouri made on the 10th day of August, 1916, in case No. 1050 establishing a net rate for natural gas in Kansas City, Missouri, effective November 19, 1916, for and on the application of the Kansas City Gas Company was an attempt directly and unduly to burden and regulate interstate commerce and was unauthorized and void, as being violative of the Federal Constitution, as appears in paragraph "third" of said final judgment and decree entered August 13, 1917, for the reason that said order was made immediately on the application of the Kansas City Gas Company to enable it to charge and collect from its own consumers the net rate of 30 cents per thousand cubic feet for natural gas in conformity with the aforesaid supply-contracts existing between the Kansas City Gas Company and the Kansas Natural Gas Company, its successors and assigns, under which the Receivers had operated since their appointment on October 9, 1912, and by the terms of which said Kansas Natural Gas Company, its successors and assigns, agreed to furnish and sell natural gas to the Kansas City Gas Company for the consideration of $62\frac{1}{2}$ per cent of the gross receipts realized from the sale of said gas at said 30-cent rate.

ASSIGNMENT OF ERRORS BY THE WYANDOTTE COUNTY GAS COMPANY

The Wyandotte County Gas Company assigned the following errors (Rec. 715):

Assignment No. 1. The Court erred in holding, adjudging and decreeing that the business transacted by The Wyandotte County Gas Company, to-wit, the distribution and sale of natural gas in Kansas City, Kansas, and Rosedale, Kansas, furnished to it by the Kansas Natural Gas Company and its Receivers, John M. Landon and George F. Sharitt is interstate commerce of a national character and not of a local nature, and enjoining said Wyandotte County Gas Company from interfering with said Kansas Natural Gas Company and its Receivers establishing and maintaining, without the consent and over the objection of the Wyandotte County Gas Company, natural gas rates approved by the Court for the patrons and consumers of The Wyandotte County Gas Company in Kansas City, Kansas, and Rosedale, Kansas, as appears from the Order entered on July 5, 1917, and the final Judgment and Decree entered on August 13, 1917, in paragraphs "second", "seventh", "ninth", and "tenth" for the following reasons, to-wit:

(a) The Wyandotte County Gas Company is a Kansas corporation, chartered to do a public utility service in Kansas City, Kansas, and Rosedale, Kansas, and is doing a business affected with a local public interest under franchises duly granted by the State of Kansas and its municipalities granting the use of the public streets of said Cities for such purpose.

(b) The Wyandotte County Gas Company has purchased its supply of natural gas from the Kansas Natural Gas Company or its Receivers since 1906 under and pur-

suant to a written contract dated February 1, 1906, fixing the price that the Wyandotte County Gas Company should pay said Kansas Natural Gas Company, its successors and assigns, for said gas

(c) There has been no agreement between the Kansas City Gas Company and the Kansas Natural Gas Company or its Receivers providing for any alteration, modification, change, rescission or cancellation of that contract.

(d) The Kansas Natural Gas Company and its Receivers have no franchise to furnish, sell or distribute gas in Kansas City, Kansas, or Rosedale, Kansas, and no right to lay and maintain pipes in its streets and have, own or control no pipes in said Cities.

(e) The Kansas Natural Gas Company and its Receivers have no right contractual, legal or equitable, to establish and maintain rates for The Wyandotte County Gas Company, without its consent, to be charged by said Company for gas sold to its consumers in Kansas City, Kansas and Rosedale, Kansas.

Assignment No. 2. The Court erred in holding, adjudging and decreeing that the business transacted by the Kansas Natural Gas Company and its Receivers, to-wit, the transportation of natural gas from Oklahoma to Kansas and the distribution and sale of said gas in said state of Kansas by said Kansas Natural Gas Company and its Receivers, is interstate commerce of a national character and not of a local nature, and enjoining The Wyandotte County Gas Company from interfering with said Kansas Natural Gas Company and its Receivers establishing and maintaining, without the consent and over the objection of said Wyandotte County Gas Company, natural gas rates approved by the Court for the patrons and consumers of The Wyandotte County Gas Company in Kansas City, Kansas, and Rosedale, Kansas, as appears from said Order entered on July 5, 1917, and para-

graphs "second", "seventh", "ninth" and "tenth" of its final Judgment and Decree entered on August 13, 1917, for the following reasons, to-wit:

(a) The Kansas Natural Gas Company and its Receivers are doing a business affected with a public interest; their participation or interest, if any, in the distribution of natural gas in Kansas City, Kansas, and Rosedale, Kansas, is a local public utility service of and for the State of Kansas.

(b) Said Kansas Natural Gas Company and its Receivers have no franchise upon the public streets of Kansas City, Kansas or Rosedale, Kansas, but deliver, market and sell their natural gas by and through the instrumentality of The Wyandotte County Gas Company, which is a licensed agency of the State of Kansas and a public utility corporation under its laws and rendering a local public service under franchise duly granted by the State and its municipalities, by reason of which said Kansas Natural Gas Company and its Receivers have devoted their property and natural gas to the public use of the State of Kansas and submitted to state regulation and control.

(c) The Kansas Natural Gas Company and its Receivers have voluntarily made and maintained physical connections between their pipe-lines and the distribution plant of The Wyandotte County Gas Company and aid and contribute to the local public service rendered by The Wyandotte County Gas Company and thereby submitted to state regulation and control.

(d) The Kansas Natural Gas Company and its Receivers have since 1906 furnished gas to The Wyandotte County Gas Company under a contract voluntarily entered into and assumed, providing for a supply of gas by the former to the latter at certain specified prices and thereby aid and contribute to the local public service rendered by The Wyandotte County Gas Company and submitted to state regulation and control.

(e) The Kansas Natural Gas Company and Receivers cannot change or modify that contract and establish and maintain natural gas rates to the consumers of The Wyandotte County Gas Company without the consent of said Company.

(f) The purchase of gas by consumers, the sale of gas to consumers and the delivery of gas to consumers are all local transactions between the consumer and The Wyandotte County Gas Company, made, done and consummated locally.

(g) The purchase of gas by The Wyandotte County Gas Company and the sale of gas by the Kansas Natural Gas Company or Receivers to The Wyandotte County Gas Company and the delivery of gas to said latter Company are local transactions between The Wyandotte County Gas Company and said Kansas Natural Gas Company and its Receivers, done and performed in the State of Kansas.

(h) When a consumer elects or determines to buy gas, delivery is made to him instantan out of the stock on hand stored in the pipes of The Wyandotte County Gas Company in the State of Kansas.

(i) The maintenance of service on the consumer's premises filled with gas and a meter to record the measurement thereof, constitute an implied standing offer to sell, measure and deliver locally on the consumer's premises at a reasonable, customary or authorized price; the turning of the gas cock by the consumer constitutes an acceptance of that offer and the receipt of the gas on the premises locally and a promise to pay a reasonable, customary or authorized price.

(j) There is no contractual relation existing between the consumer and the Kansas Natural Gas Company or Receivers. The consumer deals exclusively with The Wyandotte County Gas Company. The consumer gives no advance orders for gas to be delivered in the future, but takes gas instantan from the pipe extending into his premises according to his needs from time to time.

(k) The Kansas Natural Gas Company and Receivers are more than carriers; they are local merchants or dealers constantly offering gas for sale locally and for delivery locally in Kansas to The Wyandotte County Gas Company. The price as between The Wyandotte County Gas Company and the Kansas Natural Gas Company or Receivers is fixed by contract or must hereafter be fixed by contract.

(l) The contracts between the Kansas Natural Gas Company and The Wyandotte County Gas Company under which the business was commenced in 1906, and under which the Receivers have long continued to operate, obligate the Kansas Natural Gas Company and its successors "to supply gas" and "to furnish gas" at Kansas City and Rosedale in the State of Kansas to The Wyandotte County Gas Company. Transportation was and is merely incident to that undertaking. It was and is a necessity to the business of "furnishing" and "supplying" gas. It is wholly immaterial as between the parties where the gas is found, produced or obtained, whether in Kansas, Missouri, Oklahoma, Texas or Louisiana. The obligation undertaken and the course of business of the Kansas Natural Gas Company and its Receivers always was, is and ever must be to "furnish" and "supply" gas to The Wyandotte County Gas Company at Kansas City and Rosedale in the State of Kansas.

(m) The Wyandotte County Gas Company has dedicated its properties to a local public use and engaged in a business affected with a local public interest, and undertaken to perform a service to which the general public may resort at will and receive instantaneous, uniform and equal service without discrimination at a uniform, reasonable and compensatory, and authorized rate.

(n) The Kansas Natural Gas Company and Receivers have voluntarily devoted their pipelines and their natural gas in aid of the local public service performed by

The Wyandotte County Gas Company and *pro tanto* have consented and submitted to state regulation and control.

Assignment No. 3. The Court erred in holding, adjudging and decreeing that the following described gas-supply-contract existing between the Kansas Natural Gas Company and The Wyandotte County Gas Company is not binding upon the Receivers, John M. Landon and George F. Sharitt, and permanently enjoining The Wyandotte County Gas Company from enforcing the said supply-contract or rates fixed or referred to therein against said Receivers, to-wit, the contract dated February 1, 1906, between The Wyandotte Gas Company, predecessors of The Wyandotte County Gas Company and The Kansas City Pipe Line Company, which contract was assumed by the Kaw Gas Company predecessors of the Kansas Natural Gas Company under the lease dated February 2, 1906, between said Kaw Gas Company and The Kansas City Pipe Line Company and again assumed by said Kaw Gas Company under the lease dated November 17, 1906, between the Kaw Gas Company and The Kansas City Pipe Line Company, and which was again assumed by the Kansas Natural Gas Company under the lease dated January 1, 1908, between the Kansas Natural Gas Company and The Kansas City Pipe Line Company, as appears from paragraph "fifth" sub-division 2, and paragraphs "seventh" and "eighth" of said final Judgment and Decree entered August 13, 1917, and said Order and Judgment entered in said cause on July 5, 1917, for the following reasons, to-wit:

Wyandotte County Gas Company refers to the reasons set forth in paragraphs lettered A, B, C, D, E, F, G, H, and I of Assignment No. 3 of the Kansas City Gas Company and adopts the same as its reasons and grounds for the foregoing assignment of error as fully and completely as if written at length herein for the reason that

said supply-contract existing between The Wyandotte County Gas Company and the Kansas Natural Gas Company, its successors and assigns, is similar in form and identically in substance and terms to the supply-contracts existing between the Kansas City Gas Company and said Kansas Natural Gas Company, its successors and assigns, referred to in the reasons given by said Kansas City Gas Company for its Assignment of Errors No. 3.

Assignment No. 4. The Court erred in holding, adjudging and decreeing that the performance by the Kansas Natural Gas Company and its Receivers of said gas-supply-contract described in paragraph "fifth", sub-paragraph 2 of its Decree entered on August 13, 1917, and the enforcement of said contract by The Wyandotte County Gas Company against said Kansas Natural Gas Company and its Receivers constituted an invasion or denial of the right of the Kansas Natural Gas Company and its Receivers to engage in interstate commerce and resulted in the confiscation of the property of said Kansas Natural Gas Company and Receivers in violation of the Federal Constitution.

ASSIGNMENT OF ERRORS BY FIDELITY TRUST COMPANY AND THE KANSAS CITY PIPE LINE COMPANY, JOINTLY.

The Kansas City Pipe Line Company and its Trustee, the Fidelity Trust Co. assigned the following errors (Rec. 719):

Assignment No. 1. The Court erred in holding, adjudging and decreeing that the business transacted by the Kansas Natural Gas Company and its Receivers and the business transacted by the Kansas City Gas Company and The Wyandotte County Gas Company, to-wit, the transportation of natural gas from Kansas and Oklahoma to Missouri and Kansas and the distribution and sale of said gas in said states by either the Kansas Natural Gas Company and its Receivers or the Kansas City Gas Company and The Wyandotte County Gas Company is interstate commerce of a national character and not of a local nature, and enjoining the Fidelity Trust Company and The Kansas City Pipe Line Company and their co-defendants from interfering with said Kansas Natural Gas Company and its Receivers establishing and maintaining, without the consent and over the objection of said Trust Company and Kansas City Pipe Line Company, natural gas rates approved by the Court for the patrons and consumers of the Kansas City Gas Company in Kansas City, Missouri, and the patrons and consumers of the Wyandotte County Gas Company in Kansas City, Kansas, and Rosedale, Kansas, as appears from the order and judgment of said Court entered on July 5, 1917, and the final Judgment and Decree of said Court entered on August 13, 1917, and particularly from paragraphs "second", "seventh", "ninth", and "tenth" of said final judgment and decree, for all the reasons set forth in Assignments Nos. 1 and 2 in

the Assignments of Errors by the Kansas City Gas Company and The Wyandotte County Gas Company, hereby referred to and adopted by these defendants.

Assignment No. 2. The Court erred in holding, adjudging and decreeing that the following described gas-supply-contracts are not binding upon the Receivers John M. Landon and George F. Sharitt and permanently enjoining the Fidelity Trust Company and The Kansas City Pipe Line Company from enforcing the said supply-contracts or rates fixed or referred to therein against said Receivers, to-wit, (1) the contract dated November 17, 1906, between McGowan, Small and Morgan, grantees, predecessors of the Kansas City Gas Company, and the Kansas City Pipe Line Company which was assumed by the Kaw Gas Company, predecessors of the Kansas Natural Gas Company by lease dated November 19, 1906, between said Kaw Gas Company and Kansas City Pipe Line Company; and the contract dated December 3, 1906, between said McGowan, Small and Morgan and said Kansas City Pipe Line Company which was assumed by said Kaw Gas Company by agreement dated December 5, 1906, both of which contracts dated November 17, 1906, and December 3, 1906, respectively, were further assumed by the Kansas Natural Gas Company under the lease dated January 1, 1908, between the Kansas Natural Gas Company and the Kansas City Pipe Line Company; and (2) the contract dated February 1, 1906, between the Wyandotte Gas Company, predecessor of The Wyandotte County Gas Company, and The Kansas City Pipe Line Company which contract was assumed by the Kaw Gas Company, predecessor of the Kansas Natural Gas Company, under the lease dated February 2, 1906, between said Kaw Gas Company and the Kansas City Pipe Line Company, and again assumed by said Kaw Gas Company under the lease dated November 19, 1906, between said Kaw Gas Company and said Kansas City Pipe Line Company and which was

again assumed by the Kansas Natural Gas Company under the lease dated January, 1908, between the Kansas Natural Gas Company and The Kansas City Pipe Line Company, as appears in paragraph "fifth", sub-paragraphs 1 and 2, and paragraphs "second", "seventh", "eighth", "ninth", and "tenth" of said final Judgment and Decree entered August 13, 1917, and the Order and Judgment entered on July 5, 1917, for the following reasons:

(a) For all the reasons set forth in Assignment No. 3 in the Assignment of Errors by the Kansas City Gas Company and The Wyandotte County Gas Company.

(b) For the further reason that the gas-supply-contracts above referred to were attached to and made a part of a certain lease dated January 1, 1908, between the Kansas Natural Gas Company and this defendant The Kansas City Pipe Line Company under which the Kansas Natural Gas Company leased and obtained the use of all the properties, compressor stations and pipe-lines owned by this defendant The Kansas City Pipe Line Company, constituting approximately 50 per cent of the main trunk pipeline system now operated by said Kansas Natural Gas Company or its Receivers under orders of the United States District Court for the District of Kansas in the case of *Fidelity Title & Trust Company v. Kansas Natural Gas Company, et al.*, No. 1-N, Equity, ordering and directing said Receivers to take over and operate said lease as a part of the Kansas Natural's estate as was done by the Kansas Natural Gas Company until the further order of the Court; and The Kansas City Pipe Line Company has intervened in said court and cause demanding the surrender of said properties or the adoption of said lease and the performance of said supply-contracts attached thereto by said Receivers, their successors and assigns, and said matter is still pending in said court and cause undetermined and said Receivers are still in possession of and using and reaping the benefit of said leased property and contracts.

Assignment No. 3. The Court erred in holding, adjudging and decreeing that the performance by the Kansas Natural Gas Company and Receivers of certain contracts described in paragraphs "fifth" sub-paragraphs 1 and 2 of said Decree entered on August 13, 1917, and the enforcement of said contracts by The Kansas City Pipe Line Company, Kansas City Gas Company or The Wyandotte County Gas Company against said Kansas Natural Gas Company and its Receivers constituted an invasion or denial of the right of the Kansas Natural Gas Company and Receivers to engage in interstate commerce and resulted in the confiscation of the property of said Kansas Natural Gas Company and Receivers in violation of the Federal Constitution.

THE ERRORS RELIED UPON.

The errors relied upon more briefly stated are as follows:

The court erred:

1. In holding the business of the Kansas City Gas Company to be interstate commerce free from state control.
2. In holding the business of The Wyandotte County Gas Company to be interstate commerce free from state control.
3. In holding the business of the Kansas Natural Gas Company and its Receiver in so far as it relates to the furnishing and sale of gas in Kansas City, Missouri, and Kansas City, Kansas, to be interstate commerce free from state control.
4. In holding the 28-cent rate allowed by the Kansas Commission to the Wyandotte and other local companies to be confiscatory of the property of the Kansas Natural Gas Company or Receiver.
5. In holding that the Receiver and the Kansas Natural Gas Company have any actionable interest in the rates charged by the Kansas City Gas Company and Wyandotte County Gas Company.
6. In holding the contract for a supply of gas existing between the Kansas Natural Gas Company and Kansas City Gas Company and Wyandotte County Gas Company, operated under by the Receiver from October 9, 1912, to August 13, 1917, not binding upon the Receiver and enjoining the enforcement thereof.
7. In enjoining the Kansas City Gas Company and The Wyandotte County Gas Company from putting into

effect any rates except such as were then or might thereafter be approved by the court.

8. In fixing a net rate of 60-cents per thousand cubic feet for the Kansas City Gas Company and The Wyandotte County Gas Company to charge their consumers and requiring said companies to pay to the Receiver of the Kansas Natural Gas Company $57\frac{1}{2}$ per centum of their gross receipts therefrom.

9. In fixing natural gas rates to be charged by the Kansas City Gas Company and The Wyandotte County Gas Company and enjoining said companies from applying to the Public Service Commissions of said states to fix other rates or from putting into force and effect any rates except such as might be approved by the court.

10. In granting the relief prayed to the Receiver and to the Kansas Natural Gas Company.

ARGUMENT.

The following fatal infirmities in the plaintiff's case are disclosed by the record and will be discussed in this order:

1. The Kansas Natural Gas Company's *price* for gas was contractual, and it had no legal or actionable right, title or interest in the *rates* charged by the Kansas City and Wyandotte County Gas Companies to their patrons.
2. The Receiver's price for gas is contractual, and he has no legal or actionable right, title or interest in the rates charged by said local companies to their patrons.
3. The Wyandotte County Gas Company's rate for natural gas is legislative.
4. The Kansas City Gas Company's rate for natural gas is legislative.
5. The price paid by the Kansas City Gas Company and The Wyandotte County Gas Company to the Receiver and Kansas Natural Gas Company for gas is an item of operating cost of said local companies to be considered and approved by the state commissions in making rates for said local companies.
6. The question of interstate commerce is immaterial, remote, incidental. Reasonable regulation of public utility rates, including the allowance or disallowance of items of operating cost purchased interstate, is not burdensome regulation of interstate commerce.
7. The Receiver and Kansas Natural Gas Company offered no evidence of any agreement with the local companies to modify their supply-contracts or to increase the

price to be paid by the local companies to the supply-company for the gas furnished.

8. The Receiver and Kansas Natural Gas Company offered no evidence of the operating costs or value of the properties of the local companies, used and useful in the natural gas service of the public.

POINT I.

The Kansas Natural Gas Company's price for gas was contractual, and it had no legal or actionable right, title or interest in the rates charged by the Kansas City and Wyandotte County Gas Companies to their patrons.

In *Newark Natural Gas and Fuel Co. v. Newark*, 242 U. S. 405, where a similar relation existed between a local natural gas company and a supply company the court held that the constitutional rights of the vendors of the gas were immaterial to the plaintiff's case for the reason that the contract, "measured the vendor's consideration by a percentage of plaintiff's gross receipts."

The contracts themselves (Rec. 844) provide in terms for a *purchase and sale* of gas and fix the *price* therefor as between the makers. They recite that the first parties are the owners of gas in the gas fields and that the second parties are the owners of an ordinance of Kansas City, Missouri, and the right to lay and maintain pipes in its streets for the purpose of supplying natural gas and attach the ordinance and mark it Exhibit No. 1 (Rec. 845), and that second parties desire to secure a supply of natural gas for said city and its inhabitants. "The party of the first part hereby agrees . . . to supply and deliver . . . to said parties of the second part . . . natural gas . . . (Rec. 845). It is hereby agreed between the parties hereto that the parties of the second part may make special contracts for the sale of natural gas for manufac-

turing purposes in said city at lower rates than those specified in said ordinance, and that they shall and will make such special contracts in accordance with their agreement to that effect contained in Section 13 of said ordinance, *copy of which is hereto attached* * * * So long as the party of the first part is able to supply the same, the parties of the second part agree *to buy* from the party of the first part all gas they may need to fully supply the demand for domestic consumption in the said city *and to pay* to the party of the first part for the natural gas which they shall receive from said party of the first part * * * sixty-two and one-half per cent. of their gross receipts. Parties of the second part *make no agreement with the party of the first part respecting the rates at which they shall sell natural gas* to any consumers in Kansas City, Missouri, but expressly *reserve to themselves the right to charge* their consumers for natural gas any rate not exceeding *those mentioned in said ordinance* which they may agree upon with such consumers, but if they shall at any time agree to sell gas to domestic consumers or any persons other than manufacturers at less than the maximum rates mentioned in said ordinance, or, except in compliance with their agreement to that effect contained in Section 13 of said ordinance, to sell gas to manufacturers at a less rate than 15 cents per thousand cubic feet, and the party of the first part shall be *unwilling to accept as its compensation* therefor * * * sixty-two and one-half per cent. * * * of the gross receipts of the parties of the second part, as aforesaid, for gas so sold, the party of the first part shall be *under no obligation to furnish* the gas so sold at such lower prices, and the parties of the second part shall be at liberty to obtain the same from such other sources as they may find available" (Rec. 846).

The first party further "agrees to furnish natural gas to the parties of the second part free of charge" for use in certain street lamps and fixes the amount to be con-

sumed and the price therefor to be paid by the Kansas City Gas Company for certain other street lamps (Rec. 848). The contract was to continue during the period of said franchise-ordinance (Rec. 845) and was assignable by both parties and the parties agreed to assign the same to the city in the event the city should acquire the local gas plant (Rec. 849).

The bills in the creditors' and foreclosure suits (Rec. 870, 892) upon which this suit is dependent, allege that, "the Kansas Natural Gas Company *contracted* with each of the manufactured gas companies in the said several cities by which the Kansas Natural Gas Company should pipe its natural gas to the *limits* of the said cities and there *deliver* the same *into* the local manufactured gas system or plant and that the local manufactured gas company should there take and *receive* the said gas and through and by means of its manufactured gas plant or system of pipes distribute, market and *sell* the same to consumers thereof in the said city, and that the proceeds from domestic sales should be divided in the percentage of 66 $\frac{2}{3}$ per cent. to the Kansas Natural Gas Company and 33 $\frac{1}{3}$ per cent. to the local distributing company, except in the two Kansas Cities in which the Kansas Natural Gas Company received only 60 per cent. for the first two years and 62 $\frac{1}{2}$ per cent. thereafter, the local distributing companies receiving 40 per cent. for the first two years and 37 $\frac{1}{2}$ per cent. thereafter" (Rec. 873).

The plaintiff's bill alleges (Rec. 43) "that said gas was originally furnished by the Kansas Natural Gas Company to said distributing companies *under and pursuant to certain supply-contracts* of record in this court in said creditors' suit and foreclosure suit upon which this bill is dependent."

"That the natural gas is delivered to the consumers in the several cities by plaintiffs through distributing companies under *written contracts* of which

those set out in the files and records in cases No. 1351, Equity, and No. 1-N, Equity, of this court are typical. That the amount paid by the consumer for natural gas purchased, as measured by his meter, is divided between plaintiffs and the distributing company in payment of the services rendered by each according to the percentages set out in the *contracts* above referred to, and such amount includes the original cost of the product to plaintiffs plus the cost of transportation and profits, if any" (Rec. 19).

The plaintiff prayed that the "distributing companies * * * herein be restrained and enjoined from enforcing the *contracts above referred to*" (Rec. 46).

The evidence shows (Rec. 786) that the Kansas Natural Gas Company and its predecessors furnished and delivered and the Kansas City Gas Company and its predecessors accepted and received natural gas from Nov. 19, 1906, until the appointment of Receivers of the Kansas Natural Gas Company, Oct. 9, 1912, under and pursuant to the terms and provisions of said contracts dated November 17 and December 3, 1906, and there has been no agreement between the parties for the modification or cancellation of said contracts (Rec. 786). The same is true of the contract with The Wyandotte County Gas Company (Rec. 786).

On Aug. 10, 1916, the Kansas City Gas Company filed with the Missouri Public Service Commission a 30-cent net rate for gas and an application for approval thereof; on the same day said commission approved it and the Kansas City Gas Company put and has maintained the same in effect up to the entering of the final decree herein (Rec. 787, Stat. of Evid., par. 22; schedule and application 360). This was done as appears from the schedule, application and order of the commission, in order to enable the Kansas City Gas Company to comply with said supply-contracts by paying said Receiver for the gas furnished on the basis

of said contract, to-wit, 62½ per cent. of its receipts at said 30-cent rate.

The Wyandotte County Gas Company also put into effect and thereafter charged and collected a 30-cent rate and paid the Kansas Natural and Receiver their contract percentage thereof (Rec. 815, par. 76), but without the sanction of the Kansas Commission.

In *State of Kansas v. Flannelly, Judge, and Landon, Receiver*, 96 Kan. 372, 377, the court said in its opinion: "The distributing companies act as the agents of the Kansas Natural Gas Company in the distribution and sale of gas. The price received for gas is divided between the distributing companies and the Receivers on a percentage basis. The gas is not sold by the Receivers to the distributing companies." These were statements made in a mandamus suit where the question of principal and agent or the construction of these contracts was not in issue and the Kansas City Gas Company and The Wyandotte County Gas Company were not parties to said suit and their rights under said contracts were not thereby determined (Rec. 809, bottom of page).

In the opinion of the enlarged court it is said:

"It has not been and is not necessary for this court as at present constituted to determine the validity of the city ordinances, the contracts between the cities and the distributing companies, *the contracts between the distributing companies and the Natural Gas Company and the duties and obligations of the Receiver under them in order to adjudicate the issues it was constituted to decide and for that reason no opinion is expressed or adjudication made concerning them.*" (Rec. 311; 234 Fed. 168).

In the decree against the "Kansas defendants" (Rec. 600) it is said:

"Nothing contained in this decree, nor in the opinion upon which it is based, shall be construed as determining the rights of any of the Missouri defendants, touching the question of interstate commerce, or *the status of the distributing companies' contracts in Kansas or Missouri*" (Rec. 604).

In the opinion on final decree (Rec. 615) the trial court said:

"Now, whether these contracts were originally valid or invalid, and whether they became *functus officio* even if they were valid in their inception, are questions that it is not necessary for the court to decide at this time. The Kansas Natural Gas Company has in its pleadings prayed to have these contracts set aside as to it. I do not deem it advisable at this time to make any decision with regard to *the validity of the contracts as between the original parties to them*: Whether they are still valid, whether they have ceased to be valid or whether they were invalid in their inception. While I shall deny the prayer of the Kansas Natural Company at this time it will be without prejudice to any action on the part of that company that it may see fit to take, whether in the cases that are pending in this court No. 1351, Equity, or No. 1 Equity, or otherwise. If it should see fit to take proper action to determine the validity of these contracts this decision will not prejudice it from so doing" (Rec. 620; 245 Fed. 956).

However, the court decreed that said (Rec. 623) "contracts heretofore existing between the Kansas Natural Gas Company or its predecessors and the defendant distributing companies or their predecessors *are not binding upon the plaintiff*," and further (Rec. 625): "Seventh: • • • and the defendant distributing companies are permanently enjoined from enforcing the said supply contracts or rates

fixed or referred to therein *against plaintiff*; and from interfering with plaintiff in establishing and maintaining such rates as this court has approved or may hereafter approve for consumers of natural gas in Kansas and Missouri." And (Rec. 626): "Ninth. That all relief prayed by the Kansas Natural Gas Company herein is denied without prejudice to further action as to all matters alleged in the plaintiff's bill of complaint and supplemental bill of complaint, and in its cross bill except as granted by the former decree herein and *except that its prayer for a permanent injunction against the Public Service Commission of Missouri on the ground of interference with interstate commerce, is granted.*"

The Kansas Natural Gas Company does not have, own or hold any interest in the local plants of the Kansas City Gas Company and The Wyandotte County Gas Company (Rec. 806, par. 51). It has no franchise rights or licenses to pipe and use the streets of said cities or to furnish and sell gas to the inhabitants thereof (Rec. 806, par 50).

From the foregoing it conclusively appears that whatever price or consideration the Kansas Natural Gas Company received for the gas furnished by it to the Kansas City Gas Company and The Wyandotte County Gas Company was contractual and that it had no legal or actionable right, title or interest in any rates charged by said local companies to their patrons and that it had no cause of action against the rate-making powers of said states, irrespective of whether the business was interstate or the Kansas Natural's price or compensation for the gas furnished by it to the local companies was so low as to be burdensome or ruinous, it could not be constitutionally confiscatory. It is fundamental that contract rates are not confiscatory. *Knoxville Water Co. v. Knoxville*, 189 U. S., 434. *Railway Co. v. Massachusetts*, 207 U. S. 79, and that interstate commerce, when free, is subject to and controlled by contract.

Therefore, no injunction should have issued by the trial court against the rate-making powers in favor of said Kansas Natural Gas Company.

POINT II.

The Receiver's price for gas is contractual, and he has no legal or actionable right, title or interest in the rates charged by said local companies to their patrons.

The Receiver's rights are no greater than those of the Kansas Natural Gas Company. The Receiver succeeded to whatever rights and liabilities that company had under said supply-contracts. Those rights and liabilities could not be enlarged or diminished without the consent of the other party to said contracts.

The governing principles in such cases are as follows:

(1) Receivers in possession of trust estates may promptly cancel and repudiate executory contracts of the debtor for the unexpired portion of the term, simultaneously surrendering possession of property and claim of all future benefit under the contract, thereby relieve the receivership of all liability thereon.

(2) Receivers may adopt an unexpired executory contract, thereby becoming assignees of the term, liable on its covenants and beneficiaries thereof.

(3) The adoption of a contract may be express or implied.

(4) The repudiation of a contract must be accompanied with a surrender of all properties held and claims of benefits arising thereunder.

(5) Receivers may negotiate with parties to contracts of the debtor for a new contract in modification or substitution of the old, which, of course, must be consummated by mutual agreement.

(6) Receivers may retain possession and receive benefits under an unexpired contract of the debtor for a reasonable time, a "breathing spell," to determine whether or not the retention thereof is expedient, indispensable, profitable or necessary to the trust estate, during which time they do not become liable on the contract for the unexpired portion of the term; but they are and continue to be liable on the contract during the interim until they make their election to adopt or reject the contract, and until they surrender all claims and benefits thereof and thereunder.

(7) A receiver, being a disinterested party, a mere arm of the court in aid of creditor's claims against the debtor, may not disavow a contract unless it appears that the security of the creditors is, by virtue of the contract, being impaired to the point where they will be unable to realize on their claims against the debtor.

The foregoing propositions of law are sustained by the following authorities:

United States Trust Co. v. Wabash Railway, 150 U. S., 287;

Central Trust Co. v. Continental Trust Co., 86 Fed. 517;

Myer v. Western Car Co., 102 U. S., 1;

Miltenberger v. Logansport Railway Co., 106 U. S., 286;

Railroad Co., v. Humphreys, 145 U. S., 82;

Farmers Loan & Trust Co. v. Ry. Co., 58 Fed. 257;

Kneeland v. American Loan Co., 136 U. S., 89, 100.

No administrative order could be made in the case below. The Receiver is only plaintiff in that case. He is not Receiver in that case. He is not in custody of property by virtue of that case. He cannot legally ask and obtain

an administrative order either approving or disapproving contracts in that case. He cannot file a receiver's report or cite creditors in that case. He is a mere litigant, with no greater or other rights or standing in case No. 136-N than any other private suitor in a case *in personam*. Therefore, no decree should have been issued by the trial court in this cause disavowing said contracts.

Looking to plaintiff's bill and supplemental bill, we find that they do not allege that said contracts have been *disavowed*, cancelled or set aside. All the bill alleges is that "said contracts have never been *adopted* by plaintiffs." (Rec. 354). These two allegations are entirely different, as will hereafter more fully appear. The bill further alleges: "That this bill of complaint is dependent upon and ancillary to the causes entitled * * * No. 1351 * * * No. 1-N, now pending in this court, and is brought for the purpose of protecting the property now in the potential possession of this court in said causes, and of *enforcing the jurisdiction of this court in said causes*," and "that all the property of said Kansas City Pipe Line Company has heretofore been leased to the Kansas Natural Gas Company and is now in the possession of the Receiver of said Kansas Natural Gas Company"; that the defendant George F. Sharitt has potential possession and control of the property of the Kansas Natural Gas Company and the property under *lease* by it within the states of Kansas, Oklahoma and Missouri as Receiver of this court under order of Sept. 22, 1914, made and entered in said cases; "that said John M. Landon and R. S. Litchfield, plaintiffs, are in the actual possession and control of the property of the Kansas Natural Gas Company and the property under *lease* to it * * * and are now in the actual possession and control of the pipe-line system of the Kansas Natural Gas Company, including the *leased* lines"; that the order of Sept. 22, 1914, made by this court "ordered, adjudged and decreed that this court, through its receiver, George F. Sharitt, shall

retain the potential possession of the estates, properties and assets of the Kansas Natural Gas Company, including the leasehold estates and *contracts of and with* The Kansas City Pipe Line Company, * * * but the said John M. Landon and R. S. Litchfield and their successor shall have the right, as receivers, to retain the actual possession, control and management of the estate, property, money, funds, assets and earnings of the said Kansas Natural Gas Company, including the leasehold estates and *contracts of and with* The Kansas City Pipe Line Company, * * * the intent hereof being that if and when said state court shall surrender, lose or abandon possession, jurisdiction or control over said properties or any part thereof (otherwise than a loss of control resulting from a sale or other disposition by order of said state court), the same shall thereupon revert to the possession of the Receiver of this court, to the end that no other person, officer or court shall be enabled or permitted to seize, levy upon, possess, control or exercise jurisdiction over the estates, properties and assets of said Kansas Natural Gas Company, including the leasehold estates and *contracts of and with* The Kansas City Pipe Line Company"; that the "natural gas is delivered to the consumers in the several cities by *plaintiffs* through distributing companies *under written contracts*, of which those set out in the files and records in cases No. 1351 and No. 1-N, Equity, of this court, are typical. That the amount paid by the consumer for the natural gas purchased as measured by his meter is divided between plaintiffs and the distributing company in payment of the services rendered by each according to the percentage set out in the contracts above referred to".

These are all the allegations of the bill leveled at the contracts, except paragraph XXXIII, which admits that the gas is sold by the distributing companies and that "It is obtained from plaintiffs *as hereinbefore alleged*," and that "Gas has been delivered pursuant to the established system

of doing business prior to the appointment of plaintiffs as receivers."

The entire allegations show that the Receiver is furnishing the gas under and pursuant to the contracts and accepting the price agreed upon. The only allegation which the Receiver in his representative and disinterested capacity could make was that he had never "*adopted*" the contracts, which is a long way from alleging that he or the court had disavowed them. Even the allegation that the contracts "*are a legal and equitable fraud upon the rights of creditors*" is a conclusion of law unsustained by any fact showing that the creditors' security was impaired by virtue of said contracts to the danger point of injuring the creditors. There is no allegation that the creditors have moved for the cancellation or disavowal of said contracts or even that the Receiver has done so.

The supplemental bill set out a series of correspondence between the Kansas City Gas Company and The Wyandotte County Gas Company on the one hand, and the Receiver on the other, showing that the former were standing on their contracts and the latter was complying with the terms thereof, and that payment was being tendered under and pursuant to the terms of said contracts by the Kansas City Gas Company and accepted and received by the Receiver (Rec. 507-517). Thus it appears that the bill and supplemental bill on their face are wanting in any allegation of fact that the contracts *have been disavowed by the court or canceled by the Receiver*.

Nothing appearing on the face of the bill and supplemental bill showing that these contracts have in fact been disavowed or canceled, and it appearing that no order of disavowal or cancellation could possibly be legally made in this case, but must, if at all, be made in the administration case, it follows that any and all evidence offered in this case, tending or purporting to show that the trial court should **make an order decreeing the cancellation and disavowal**

of said contracts, is immaterial and cannot be considered in this action *in personam*, but can be offered and considered, if at all, only in the administration case.

Looking to the record in the administration case to find what has in fact been done with these contracts. The order appointing the Receivers, Holmes, Mackey and Sharitt, under which the property is still held, and by virtue of which it has always been held and the business transacted in Missouri and Oklahoma at least, and the order under which the Receiver now operates the property, commands the receivers, "to run, manage, conduct and operate such pipe lines and properties as the defendant Company holds and controls or operates under leases, contracts, arrangements or otherwise. All of which is to be done until the further order of the court, *as heretofore done, run or operated by the defendant Company*; but the court expressly *reserves to itself* the right to pass upon, *approve, disapprove, disavow and cancel* any and all leases, arrangements and *contracts* of every nature, kind and description, under or by virtue of which the defendant Company has been or is now operating any of its *leased* lines and property; or *selling or furnishing any of its gas for distribution and sale*; * * * and no such lease, arrangement or contract shall be regarded as binding or taken by the receivers until expressly ordered by this court in these proceedings; and nothing herein contained shall be considered or taken as in any way accepting, approving, satisfying or adopting any such lease, arrangement or contract."

The Receiver was further ordered to acquaint himself at once with the company's affairs and report to the court, among other things: "(d) The *prices* which it realizes for the gas it sells and copies of the *contracts with the distributing companies*" and "(j) The Receivers' suggestions as to the value of the company's leases and *contracts*, both for operating lines and *furnishing gas to the local distributing companies* in the several cities reached by the operated

lines of the defendant company and the *advisability* of *disapproving* and *disavowing* any or all of them." Full power was reserved for other and future orders in the cause.

No further order was ever made in said cause by said court either approving or *disapproving* or avowing or *disavowing* said contracts.

The order of the trial court in the administration case dated Jan. 24, 1914, directing the delivery of said properties to the state court, did not modify the provisions of said appointing order above quoted; nor did the mandate of the Circuit Court of Appeals modify said original order; nor did the order spreading the mandate dated Sept. 22, 1914, modify said order, but on the contrary it expressly provided that the Receiver of this court "shall retain the potential possession of the estates, properties and assets of the Kansas Natural Gas Company, including the leasehold estates and *contracts of and with* the Kansas City Pipe Line Company," and said order further provides for the return of said properties to this Court "including the leasehold estates and *contracts of and with* the Kansas City Pipe Line Company," which embraced and included the supply-contracts with the Kansas City Gas Company and The Wyandotte County Gas Company and the State Court Receiver was required to accept this property, and did do so, under order of the State Court upon the conditions and limitations therein contained.

It will doubtless be claimed that the State Court in said *quo warranto* suit cancelled these contracts, but on appeal from that order the Supreme Court of Kansas in *State v. Independence Gas Company et al.*, 172 Pac. 713 l. c., 714;Kan....., said: "In this action, under the pleadings as they then stood, with the action dismissed as to The Wyandotte County Gas Company, the court did not have power or jurisdiction to cancel the contracts between that company and the Kansas Natural Gas Company

(opinion p. 714)." • • • "Neither the court nor the Receiver could compel that company to receive gas at any price other than the one named in the *contract* between The Wyandotte County Gas Company and the Kansas Natural Gas Company (opinion 715)."

The Kansas City Gas Company of Kansas City, Missouri, appellant herein, was not a party to that Kansas case, and its contract was never before that court.

But the State Court itself said:

"This court, recognizing that its power does not extend beyond the State of Kansas, hereby directs said Receiver to present to the District Court of the United States for the District of Kansas, First Division, the foregoing findings of fact and conclusions of law and this order, and to pray said Federal Court for such orders as will effectuate the law applicable to the Kansas Natural properly in Missouri and Oklahoma" (Rec. 554).

This is a finding and complete recognition of the want of jurisdiction of the State Court to cancel, disavow, or set aside said contracts in Missouri.

The contracts in question, both of the Kansas City Gas Company and The Wyandotte County Gas Company, were attached to and made a part of the lease dated Jan. 1, 1908, between the Kansas Natural Gas Company and the Kansas City Pipe Line Company, and it appears from the entire record of all the cases in all the courts and the orders and decrees of all the courts that the continued possession, use and operation of all the properties of the Kansas City Pipe Line Company is essential, absolutely indispensable, to the preservation of the trust estate and the security of the creditors. The intervening petition of The Kansas City Pipe Line Company in said case No. 1351 is still pending, awaiting trial and final judgment in said cause. Until said matter is there determined, the disavowal and cancellation

of said contracts is impossible, either under the facts or law.

It follows that even though said contracts may not have yet been *adopted* by the Receiver in the sense that they run with and bind the trust estate in the hands of purchasers at foreclosure sale, yet they continue to measure the rights and liabilities of the Receivers as well as the parties thereto; and that whatever price the Receiver gets for his gas is and must continue to be contractual, either under these or some other contracts; that he has no legal or actionable interest in any rates charged by the local companies to their patrons and no cause of action against the rate-making powers of said states, irrespective of whether the business is interstate commerce or the Receiver's price is so low as to be burdensome or ruinous. If the rate is contractual it cannot be confiscatory, under the authorities heretofore cited, and the decree holding that: "The contracts heretofore existing between the Kansas Natural Gas Company or its predecessors and the defendant distributing companies or their predecessors are not binding upon the plaintiff" (Rec. 623), and the injunction against the rate-making powers in favor of said Receiver was error.

POINT III.

The Wyandotte County Gas Company's rate for natural gas is legislative.

This proposition has been finally determined by the Supreme Court of Kansas in *State ex rel. v. Wyandotte County Gas Company*, 88 Kan. 165, and affirmed by this court in *Wyandotte County Gas Company v. Kansas*, 231 U. S. 621. The same identical gas-supply-contract with the Kansas Natural Gas Company and the same franchise-ordinance, Public Utilities Act and business now before this court were here then and construed and adjudicated.

The Wyandotte Company's franchise-ordinance 6051 (Rec. 821) (Rec. in that case, p. 33), named a schedule of ~~rates commencing~~ at 25 cents per thousand cubic feet and increasing from time to time to 30 cents per thousand cubic feet. In the interim before the final increase the legislature of that state passed Chapt. 238, Laws 1911, creating a Public Utilities Commission, conferring upon it plenary powers, among which was a provision that no rates should be charged by any public utility without the consent of the commission. The Wyandotte Company claimed that its franchise rates were contractual under the authority conferred upon the city to grant said franchise, and accordingly attempted to increase its rates in conformity with said contract without the consent of the commission. The Supreme Court of the state said (page 174):

"We conclude that by the provisions of Chapter 122 of the Laws of 1903 the mayor and council of Kansas City were not authorized to contract with the appellant the rates for supplying gas to the city or its inhabitants for a period of twenty years, or for any term; that without such authority no such contract is valid; * * * that the appellant had no right to raise the rate from twenty-five to twenty-seven cents on Nov. 19, 1911, without the consent of the Public Utilities Commission."

On writ of error, this court affirmed that decision, saying, 231 U. S. 623:

"In this case, this court reaches independently the same conclusion as the state court in determining that under the authority conferred by the statute of Kansas the municipality cannot divest itself by contract of its duty to see that only reasonable rates are enforced under a public utility franchise."

It follows from the foregoing that the franchise rates of The Wyandotte County Gas Company are not contractual

but legislative; that when the state passed said Public Utilities Act (Chapt. 238, Laws 1911) Sec. 30 of which* fixed the rates in force Jan. 1, 1911, as the legal rates and precluded changes therein without the consent of the commission; and when thereafter said commission on Dec. 10, 1915 (Rec. 54), entered an order fixing a 28-cent rate for and on behalf of said The Wyandotte County Gas Company, said company was then and thereafter relieved from the obligations of said franchise-ordinance to furnish and sell natural gas at the rates therein named, "hence the rate for gas therein may be increased by the appellant to whatever sum per thousand cubic feet shall receive the consent and approval of the Public Utilities Commission" *State ex rel. v. Gas Co.*, 88 Kan. 174. Herein lies the vital interest of this appellant, The Wyandotte County Gas Company. Under the decisions of the Supreme Court of Kansas The Wyandotte County Gas Company is bound by its franchise rates, even though granted without authority, except for the operation of said Public Utilities Act and orders of said commission relieving said company therefrom, and assuming the legislative rate-making power by the state through its Public Utilities Commission. Public utility rates prescribed by a franchise ordinance "will govern until action is taken by the state or by its authority." *Emporia v. Telephone Co.*, 87 Kan. 465; 88 Kan. 443; 129 Pac. 187. If the business is interstate commerce and the commission has no jurisdiction to regulate this appellant's rates, it cannot relieve this appellant of the binding force and effect of said franchise rates and this appellant and all parties under contract with it, including the Kansas Natural Gas Company and its Receivers, are and will continue to be bound by the inadequate rates named in said franchise-ordinance 6051 (Rec. 821).

*"Sec. 30. Unless the commission shall otherwise order, it shall be unlawful for any common carrier or public utility governed by the provisions of this act within this state to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same services on the 1st day of January, 1911."

POINT IV.

The Kansas City Gas Company's rate for natural gas is legislative.

At the time of the passage of ordinance 33887 by the authorities of Kansas City, Missouri, granting a franchise to the predecessors of the Kansas City Gas Company to furnish natural gas in said city, the general statutes of said state,* provided that a gas corporation formed for the purpose of supplying any city, town or village with gas shall have the power to lay mains in the streets with the consent of the municipal authorities under such "reasonable regulations as such authorities may prescribe." The powers conferred upon the city by the Constitution, statutes and city charter are set out in the margin. * *

It readily appears that there was at the time of granting said franchise no power conferred by the legislature upon Kansas City, Missouri, to suspend by contract the sovereign power of rate regulation.

Thereafter in 1913 the General Assembly passed the Public Service Commission Act.†

*Revised Statutes of Missouri, 1909:

"Sec. 2367.—Gas, Electricity and Water Companies—Powers of.—Any corporation formed under the provisions of this article, for the purpose of supplying any town, city or village with gas, electricity or water, shall have full power to manufacture and sell, and to furnish such quantities of gas, electricity or water as may be required in the city, town or village, district or neighborhood where located, for public or private buildings or for other purposes; and such corporations shall have the power to lay conductors for conveying gas, electricity or water through the streets, lanes, alleys and squares of any city, town or village, with the consent of the municipal authorities thereof, and under such reasonable regulations as said authorities may prescribe" (R. S., 1899, Sec. 1341).

* *Art. IX, Sec. 16 of the Constitution of Missouri:

"Sec. 16.—Large Cities May Frame Their Own Charters, How Adopted and Amended.—Any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State, by causing a board of thirteen freeholders, who shall have been for at least five years qualified voters thereof, to be elected by the

From this Act it clearly appears that the state has, through the Public Service Commission resumed the legislative power of rate-making including rates for natural gas and that the commission has power to set aside and change the terms and rates named in said franchise ordinance.

In *State of Missouri on relation of Kansas City v. Kansas City Gas Company*, 254 Mo. 515, 163 S. W. 854, the court denied a writ of mandamus to compel compliance with the terms and provisions of said franchise-ordinance 33887 and remanded the parties to the Public Service Commission "for the flexible, speedy and sensible remedies prescribed by the Act" (page 540) saying:

"He who reads that Act, and does not see a complete rounded scheme for dealing with the business of public utilities at every spot where the shoe pinches the public or the utility, reads it to little purpose. He who reads it, and does not see that the yearning of the law-maker was to have the courts trust the commission in the first instance to solve such business problems as those presented in this case, reads it to still less purpose. We cheerfully bow to the evident intent of the lawmaker, shining on every page of his Act as expressive of the will of the people in constitutional form" (page 541).

qualified voters of such city at any general or special election; which board shall within ninety days after such election, return to the chief magistrate of such city a draft of such charter, signed by the members of such board or a majority of them. Within thirty days thereafter, such proposed charter shall be submitted to the qualified voters of such city, at a general or special election, and if four-sevenths of such qualified voters voting thereat shall ratify the same, it shall, at the end of thirty days thereafter, become the charter of such city, and supersede any existing charter and amendments thereof. A duplicate certificate shall be made, setting forth the charter proposed and its ratifications, which shall be signed by the chief magistrate of such city and authenticated by its corporate seal. One of such certificates shall be deposited in the office of the Secretary of State, and the other, after being recorded in the office of the recorder of deeds for the county in which such city lies, shall be deposited among the archives of such city, and all courts shall take judicial notice thereof. Such charter, so adopted may be amended by a proposal therefor, made by the lawmaking authorities of such city, published for at least thirty days in three newspapers of the largest circulation in such city, one of which shall be a newspaper printed in the German language, and accepted by three-fifths of the qualified

Other recent Missouri cases specifically holding that the Public Service Act and orders of the commission supersede franchise-ordinance rates are as follows:

State of Missouri on relation of City of Sedalia v. Public Service Commission, Mo., 204 S. W. 497;

State ex rel. v. Public Service Commission, 259 Mo. 704, 168 S. W. 1156;

State v. Public Service Commission, 270 Mo. 547, 194 S. W. 287.

From the foregoing authorities it is clear that the Public Service Act of Missouri relieves the Kansas City Gas Company from continuing to furnish and sell natural gas to said city and its inhabitants at the rates named in said franchise-ordinance and entitles it to a hearing before said commission and an allowance of reasonable and com-

voters of such city, voting at a general or special election, and not otherwise; but such charter shall always be in harmony with and subject to the Constitution and laws of the State."

"Sec. 9703.—City of Over 100,000 May Frame Charter.—Procedure.—Amendments.—(This section is the exact words of Sec. 16, Article IX of the Constitution above set forth with the addition of the following):

"A duplicate certificate shall be made, setting forth such amendment and its ratification, which shall be signed by the chief magistrate of such city and authenticated by its corporate seal. One of such certificates shall be deposited in the office of the Secretary of State, and the other after being recorded in the office of the Recorder of Deeds for the county in which such city lies, shall be deposited among the archives of such city, and all courts shall take judicial notice thereof" (R. S., 1899, Sec. 6359) (Laws 1887, p. 42).

"Sec. 9704.—Takes Effect Thirty Days After Adoption.—After the expiration of said thirty days after the ratification and adoption of such charter as aforesaid, such charter shall be and constitute the entire organic law of such city, and shall supersede all laws of this state then in force in terms governing or appertaining to cities having one hundred thousand inhabitants or more" (R. S. 1899, Sec. 6360).

"Sec. 9752.—City Has Exclusive Control of Public Highways.—Such city shall have exclusive control over its public highways, streets, avenues, alleys and public places, and shall have exclusive power, by ordinance, to vacate or abandon any public highway, street, avenue, alley or public place, or part thereof, any law of this state to the contrary notwithstanding" (R. S., 1899, Sec. 6408) (Laws 1887, p. 51).

"Sec. 9753.—Regulation of Public Franchises.—It shall be lawful for any such city in such charter or by amendment thereof, to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any streets or public places of such

pensatory rates. Herein lies the interest of the Kansas City Gas Company in reversing the order of the trial court holding the business conducted by this company to be interstate commerce free and therefore not entitled to the benefits of said Public Service Act and the right to reasonable, compensatory, legislative rates fixed by the commission thereunder.

It is obvious and axiomatic that if the business of this appellant is interstate commerce free from state regulation, it is not entitled to the benefits of said statute and commission orders and said business is subject to and regulated by contract, to-wit, the unremunerative franchise rates.

POINT V.

The price paid by the Kansas City Gas Company and the Wyandotte County Gas Company to the Receiver and Kansas Natural Gas Company for gas is an item of operating cost of said local companies to be considered and approved by the commissions of said states in making rates for said local companies.

city, whether such franchises or privileges have been granted by said city or by or under the State of Missouri, or any other authority" (R. S., 1899, Sec. 6408) (Laws, 1887, p. 51).

The special charter of Kansas City, Missouri, in effect since May 9, 1889, contains the following provisions:

"Article III. Sec. 1. The mayor and common council shall have
• • • power by ordinance:

"Twenty-eighth. To regulate the price to be charged by telephone, telegraph, gas and electric light companies, and to compel them and all persons and corporations using, controlling or managing electric wires for any purpose whatever to put and keep their wires under ground, and to regulate the manner of doing the same and the use of all such wires and all connections therewith."

"Thirty-first: To pass, publish, amend and repeal all such ordinances, rules and police regulations not inconsistent with the provisions of this charter or the laws of the State, as may be expedient in maintaining the peace, order, good government, health and welfare of the city, its trade, commerce and manufacturers, or that may be necessary and proper for carrying into effect the provisions of this charter."

"Article XIV. Sec. 1. The city shall have power to construct and operate gas works or electric light works, or any other kind of works for the purpose of lighting streets and public buildings and premises

POINT VI.

The question of interstate commerce is immaterial, remote, incidental. Reasonable regulation of public utility rates including the approval or disapproval of items of operating cost purchased interstate, is not burdensome regulation of interstate commerce.

The foregoing points are so closely related that they will be considered together. From what has gone before it logically follows that the Kansas City Gas Company and The Wyandotte County Gas Company are local public utilities subject to the jurisdiction of the commissions of said states; and that the *price* they pay for gas is merely one item of the operating costs of said local companies to be considered and approved or disapproved as the cir-

and property of private persons, and also to purchase any kind of such works heretofore or hereafter erected, and to operate the same for such purpose."

"Article XIV, Sec. 12. The city may grant to any person or corporation the right or franchise to conduct the material or means for lighting from any kind of works specified in the first section of this Article, under or along or over any of the streets, avenues, alleys or public highways, or public grounds of the city for the purpose of lighting streets, avenues, alleys and public highways of the city and public buildings and private premises; but no franchise or grant for any such purpose shall confer an exclusive right nor be made for a longer period than thirty years, nor be renewed or extended except within the last two years of such term, and then not beyond thirty years: provided, that no such person or corporation shall in any event charge more for light for the city or private parties than the price specified from time to time by ordinance of the city, and that the city shall also have power to regulate and fix from time to time the prices such person, or company may charge for the renting of meters or apparatus for ascertaining the quantity of material or means consumed for lighting: and provided further, that the city shall not, in making the original grant, nor in any manner subsequent thereto, ever agree or bind itself to pay any fixed price for lighting streets, avenues, public highways, alleys, public grounds or public buildings of the city for a longer period than one year at a time. In case of any such grant to a person or corporation the city shall always have the right to designate the kind of meter or apparatus to be used for the correct measurement of the material or means furnished for lighting under such grant, and to provide for inspecting and regulating same, and to compel an exact compliance with any provisions made by ordinance in that regard; and the city shall also have the right to appoint one or more measurers, whose duty it shall be to inspect all such meters and apparatus and certify to the correctness of all bills made against the consumers of the material or means for lighting, and per-

cumstances require by the commissions in making rates for said local companies. Of course, this price, like every other item of operating cost, is reflected in the consumers' rates. But one of the vital errors in this case is the assumption that the price of this gas to the Receiver is the whole or major part of the service furnished and sold by the local companies to their patrons. It is well settled that the "holder cost" (corresponding to the Receiver's price), of gas is only 30 or 40 per cent as compared to 60 or 70 per cent for distribution cost. When the gas starts from the wells its market value is 2, 4 or 6 cents (Rec. 1096 and 1101); the gathering and transportation costs are 8 to 12 cents and the distribution cost of the local company is from 20 to 70 cents depending upon the

form such other duties as may be prescribed by ordinance. Every person or corporation using a grant or franchise under this section shall in using or occupying the streets, avenues, public highways, alleys, public grounds and public buildings of the city, conduct work and operations as may be from time to time prescribed by ordinance, as so as to avoid unnecessary injury or inconvenience to the public and all citizens, and so as to avoid injury and damage to all persons and parties and private property, and shall use at least the same care to avoid such injury and damage that the city would be bound to use if it was conducting such work and business, and shall save the city harmless from all loss, costs and expense on account of any such injury or damage, and on account of anything done in the prosecution of any such work, and the use of any such grant or franchise, and when any street, avenue, public highway or alley, or public ground shall be opened or disturbed in the construction of any such work, shall repair the same to the satisfaction and approval of the board of public works, and so as to leave the same in as good condition for ordinary public use as it was at the time of opening or disturbing the same, and no such opening or disturbance shall be continued longer than necessary. Whenever the city may grant any right or franchise under this section it shall have the right to purchase the works, and all the appurtenances belonging thereto for furnishing the material and means for lighting, at any time during the term for which such grant may be made, whether such right be reserved expressly in the grant or not. The city may exercise all power conferred by this section by ordinance, and may, by ordinance, from time to time, make provisions for accomplishing the results herein contemplated, and enforce the same."

"Article XVI, Sec. 1. The city shall have exclusive control of all its public highways, streets, avenues, alleys and public places, and shall have exclusive power to vacate or abandon any public highway, street, avenue, alley or public place, or any part thereof."

"Article XVII, Sec. 20. It shall be lawful for the city to regulate and control the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of the city, whether such franchise or privilege has been or may be granted by the city or by or under the State of Missouri, or any other authority."

character and volume of the business, the consumers' rates and the uses for which the gas is sold.

The functions of the commission are administrative and designed to be constructive and helpful to public utilities. *State v. Gas Company*, 254 Mo. 515, at page 534. The commission may ascertain the volume of gas available and determine upon a rate which will regulate and restrict the use to the more necessary purposes for which it is available and upon such determination it will approve such contract between the local company and the supply company as will enable the latter to furnish and the former to buy said gas for such uses and insure adequate and satisfactory service to the consumers. This is very much the same as the contracting parties themselves did in the early history of the business when they agreed upon the rates at which the gas would be sold to consumers and the price to be paid the Kansas Natural, and the purposes for which it was to be used, namely, not only

†The Public Service Act of Missouri, Laws 1913, pages 556 to 651, as amended by Laws 1917, pages 432 to 441 contain the following provisions (Rec., 780):

"Sec. 1.—Short Title.—This act shall be known as the 'public service commission act', and shall apply to the public services herein described and the commission herein created, and to the public service corporation, persons and public utilities mentioned and referred to in this act" (Laws, 1913, p. 557).

"Sec. 2, Sub-div. 10. The terms 'gas plant', when used in this act, includes all real estate, fixtures and personal property owned, operated, controlled, used or to be used for or in connection with or to facilitate the manufacture, distribution, sale or furnishing of gas (natural or manufactured) for light, heat or power" (Laws, 1913, p. 558).

"Sec. 2, Sub-div. 11. The term 'gas corporation', when used in this act, includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any gas plant operating for public use under privilege, license or franchise now or hereafter granted by the state or any political sub-division, county, or municipality thereof" (Laws, 1913, p. 558).

"Sec. 2, Sub-div. 25. The term 'public utility', when used in this act, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation and heat or refrigerating corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this act" (Laws, 1913, p. 560).

domestic cooking and lighting but also vast quantities for heating, industrial, power and manufacturing purposes.

The record discloses that the Kansas Natural and Receiver are no longer able to furnish gas in quantities sufficient to meet the demands for heating and industrial uses and the entire relations of the parties must be readjusted and the business reconstructed upon a new basis. This can be done equitably and in fairness to all, only under the protecting, administrative and regulating powers of the Public Service Commissions. The commissions would, upon application of the local company, require said company to present a proposed contract with the supply company, setting forth specifically the amount of gas available and how much the supply company would undertake to furnish at a given price and upon that contract when approved by the commission as an item of operating cost

"Sec. 2, Sub-div. 26. The term 'service' when used in this act, is used in its broadest and most inclusive sense and includes not only the use and accommodation afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility, and to the use and accommodation of consumers or patrons" (Laws, 1913, p. 560).

"Sec. 2, Sub-div. 27. The term 'rate', when used in this act, shall mean and include every individual or joint rate, fare, toll, charge, reconsigning charge, switching charge, rental or other compensation of any corporation, person or public utility, or any two or more such individual or joint rates, fares, tolls, charges, reconsigning charges, switching charges, rentals or other compensations of any corporation, person or public utility or any schedule or tariff thereof" (Laws, 1913, p. 560).

"Sec. 67.—Application of Article.—This article shall apply to the manufacturing and furnishing of gas for light, heat or power and the power and the furnishing of natural gas for light, heat or power and the generation, furnishing and transmission of electricity for light, heat or power, and the supplying and distributing of water for any purpose whatsoever" (Laws, 1913, p. 602) (Rec., 781).

"Sec. 69.—General Powers of Commission in Respect to Gas, Water and Electricity.—The commission shall: * * * 12.—Have power to require every gas corporation, electrical corporation, water corporation and municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established and enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates; charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation, water corporation or municipality; but this sub-division shall not ap-

of the local company, the commission could compute, ascertain and determine the total operating costs and fair return of the local company and reasonable rates to consumers for adequate and satisfactory service. In the absence of such a basis, no rate can ever be determined and no adequate and satisfactory service can ever be furnished to the consumers. It is admitted in this case that the service is irregular, inadequate and intolerable.

In this very litigation *St. Joseph Gas Co. v. Barker, Atty. Gen., et al.*, 243 Fed. 206, an enlarged court convened on the application of the St. Joseph Gas Company, denied an injunction on the ground that the price to be paid by the St. Joseph Gas Company to the Receiver was a matter of contract. "Until the question of the abrogation or modification of the contract between complainant and the producing company should be presented to the

ply to state, municipal or federal contract. Unless the commission otherwise orders, no change shall be made in any rate or charge or in any form of contract or agreement, or any rule or regulation relating to any rate, charge of service, or in any general privilege of facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation or municipality in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation or municipality refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time" (Laws, 1913, p. 607) (Rec., 782).

"Sec. 70—Power of Commission to Stay Increased Rate.—Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or municipalities any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service

court appointing the Receiver, complainant was not entitled to have enjoined an order of the Missouri Commission prohibiting an increase of its rates, for such increase might only result in a detriment to its patrons, and not increase complainant's income." In the same case before the commission (*City of St. Joseph v. St. Joseph Gas Co.*, P. U. R., 1917F, 743) the commission denied an increase in rates to the St. Joseph Gas Company because it appeared from the record that the contract price 26 $\frac{2}{3}$ cents paid by the St. Joseph Gas Company to the Receiver for said natural gas was far in excess of the price paid by other distributing companies similarly situated (Rec. 308; 243 Fed. 210) and was an improvident—an unreasonable item of operating cost.

It is fundamental that a commission in fixing rates is not bound by the improvident contracts of public utilities.

or to any general privilege or facility, the commission shall have, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested gas corporation, electrical corporation, water corporation or municipality, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation, or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the gas corporation, electrical corporation, water corporation or municipality affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice, would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective: Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate sought to be increased after the passage of this act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation, electrical corporation, water corporation, or municipality, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible" (Laws, 1913, p. 608) (Rec., 783).

INTERSTATE COMMERCE.

Much space and labor is devoted to the subject of interstate commerce by counsel for the commissions, the cities and the Receiver. The original package doctrine, the right of an importer to a clear sale, the commingling of imports in the mass of goods in the state, and the intent of the shipper, are all ably discussed and authorities cited. We will not attempt a discussion of the subject for we regard it wholly immaterial to the issues, remote and incidental for the following reasons.

The contracts existing between the Kansas Natural and the Kansas City Gas Company and other distributing companies are primarily and essentially contracts for *furnishing* gas to said local companies. It is wholly immaterial where the gas comes from. The original contracting parties contemplated the bulk of the business would be done in Kansas. The accident of geography does not change the contract or the intent of the parties in which the obligation of the supply company was to *furnish gas at the city gates*. The entire transaction as between the supply company and local company is local, the Receiver merely succeeded to the rights and liabilities of the Kansas Natural—no greater, no less. The Receiver cannot change or modify those contracts without the consent of the local parties. He has no right as an importer and no cause of action to force his product upon the local company against its will. "Neither the court nor the Receiver could compel that company to receive gas at any price other than the one named in the contract between the Wyandotte County Gas Company and the Kansas Natural Gas Company" (*State v. Independence Gas Co. et al.*, 172 Pac. 713, 1. c. 715).

If the contract were legally disavowed by the court in the interest of the trust estate, it would create no right in the Receiver to usurp the right of the local gas company to determine its own rates and secure the approval of the

Public Service Commission therefor. The Receiver had no right, title or interest in or to the local company's plant (Rec., 806) or any rights or franchises upon the streets of said city (Rec., 806). The right of an importer to import does not create a property interest in the local company nor does it carry franchise rights on the city streets.

The reasonable regulation of public utility rates necessarily involving a consideration of the reasonable operating costs which includes an inspection and allowance or disallowance of the price paid by a public utility for all articles of interstate commerce entering into said operating cost such as oil, coke, coal and gas, is not the regulation of interstate commerce. If such were true, a state commission could never question the price paid by a local public utility for coal, coke, oil, iron, materials or supplies purchased interstate. Such a rule would nullify all state regulation of public utilities.

Again, it must be presumed that rates fixed by Public Service Commissions are compensatory. This presumption prevails until proven to the contrary. If found to be unreasonable or confiscatory they may be set aside by a court. When so annulled the utility is free to put into effect reasonable rates of its own making. "Where a court having jurisdiction determines that a rate fixed by the statute and approved by the utilities commission is confiscatory, the utility is left free to operate under such rate as it may establish until a new one has been fixed by the commission" (*Telephone Co. v. Utilities Commission*, 97 Kan., 136; *State v. Indep. Gas Co.*, 172 Pac., 713; *Love v. Railway Co.*, 185 Fed. 321).

It follows that if the rates are reasonable they can not be a burden upon or an interference with interstate commerce. Without regulation they would probably be so high as to restrict and interfere with interstate commerce.

The corollary from the foregoing is that all the court

below was required to determine was whether or not the 28-cent rate fixed by the Kansas Commission was confiscatory. That done, the local utilities were free to make new contracts for gas with the Receiver and put into effect rates of their own liking sufficient to pay the Receiver and afford themselves a fair return. It follows that the findings, holdings and decree of the court below that the business was interstate commerce were unnecessary to a decision and obiter.

Assuming that the question of interstate commerce was material, the Kansas Natural Gas Company and Receiver, to the extent that they participate in the business of the local companies affected with a public interest have *pro tanto* devoted their properties to a local public use and to that extent submitted to state regulation.

The record shows that the Kansas Natural Gas Company and its Receiver maintain a physical connection (Rec., 809-10) between their pipe-lines and the plants of the local utilities; that they have by contract undertaken to furnish gas pursuant to and in accordance with franchises duly granted by the cities served; that they assume an interest in the rates charged consumers by the local companies and have even undertaken to dictate to said local companies what such rates will be. By this course of procedure the Kansas Natural and its Receiver have devoted their properties to a local public utility business affected with a local interest subject to state regulation and control. They must assume that such regulation is reasonable and will result in reasonable rates commensurate with the value and character of the service furnished.

The instant case may be distinguished from all the cases cited by appellees by the following essential facts:

(1) The purchase of gas by the consumer, the sale of gas to the consumer and the delivery of gas to the consumer are all wholly, exclusively and essentially local transactions.

(2) The purchase of gas by the Kansas City Gas Company, the sale of gas by the Kansas Natural Gas Company to the Kansas City Gas Company and the delivery of gas to said local company are all wholly, exclusively and essentially local transactions.

(3) When the consumer elects to buy a foot or 10,000 feet of gas, delivery is made to him "instantly" out of the stock on hand (Rec., 812).

(4) The maintenance of service pipes on the consumer's premises filled with gas and a meter to record the measurement thereof constitute an implied standing offer to deliver, measure and sell locally, at and on the consumer's premises, at a reasonable or authorized price; the turning of the cock constitutes an acceptance of that offer and a receipt of the gas on the premises locally and a promise to pay a reasonable or authorized price.

(5) There is no contract or agreement as to volume, price or time of delivery between any consumer and the Kansas City Gas Company or Kansas Natural Gas Company, or between the Kansas City Gas Company and the Kansas Natural Gas Company.

(6) The Kansas Natural Gas Company not only carries gas to Kansas City, but produces, purchases and owns the commodity from the wells at least to the distributing system, and claims an interest in it at the time and place of delivery to the consumer. It is more than a carrier; it is a local merchant or dealer continuously offering its commodity for sale locally and for delivery locally, either to the local company or through it to the general public.

(7) The contract under which the business was launched and the undertakings and course of business of the Kansas Natural Gas Company has been "to supply gas" and "to furnish gas" at Kansas City to the Kansas City Gas Company. Transportation was and is merely incident to that contract and undertaking. It was and is a necessity to the business of *furnishing*. It is wholly immaterial

where the gas is found, produced or obtained, whether in Missouri, Kansas, Oklahoma, Texas or Louisiana; the obligation, undertaking and course of business of the supply company, is, always was and ever must be to *furnish* gas at Kansas City. If transportation is necessary thereto, it is a mere incident to the local transaction of furnishing gas at, to and for Kansas City and its inhabitants.

(8) The Kansas City Gas Company has dedicated its properties to "a public use," to "a business affected with a public interest", to a service to which the general public may resort at will and receive instantaneous, uniform and equal service, without discrimination, for a uniform and reasonable or authorized price.

(9) The Kansas Natural Gas Company has voluntarily devoted its properties and its gas to aiding and assisting the Kansas City Gas Company in the performance of said public business.

It is settled law that the right of conducting traffic and commercial intercourse between the states is independent of state control and that the non-action of Congress indicates it will that the commerce shall be free and untrammelled, and the states cannot directly interfere therewith. *South Covington & C. S. R. Co. v. City of Covington*, 235 U. S., 537.

It is also settled that the right of carrying natural gas from one state into another is the right of conducting traffic and commercial intercourse in natural gas between states and cannot be prohibited under color of the police power of the state. *Haskell v. Kansas Natural Gas Co.*, 224 U. S., 217; *West v. Kansas Natural Gas Co.*, 221 U. S., 229.

It is equally well settled that "rate-making is a legislative function" of the state. *City of Knoxville v. Knoxville Water Co.*, 212 U. S., 1; *Osborne v. San Diego L. & T. Co.*, 178 U. S., 22. And that "only the legislature of the state
 • • • can surrender • • • a governmental power

such as fixing rates". *Home Telephone Co. v. Los Angeles*, 211 U. S., 265. And "one whose rights are subject to state restriction cannot remove them from the power of the state by making a contract about them, * * * and one cannot acquire a right to property by his desire to use it in commerce among the states". *Hudson Water Co. v. McCarter*, 209 U. S., 349.

It is also well settled that "a general conception of the law-making bodies of the country that a business requires governmental regulation, is not accidental and cannot exist without cause," and "where a business * * * is affected with a public use, it is the business that is the fundamental thing; property is but the instrument of such business." *German Alliance Ins. Co. v. Kansas*, 233 U. S., 289. And that the business of furnishing, distributing and selling natural gas is a public utility business, a business affected with a public use, "requiring governmental regulation" and subject to state control. *The Wyandotte County Gas Co. v. Kansas*, 231 U. S., 622.

It is equally well settled that one who devotes his property to a public use, to a use affected with a public interest, to a use to which all the public may resort on equal terms thereby submits to governmental regulation and control all such property and the use thereof. *Terminal Taxicab Co. v. Dist. of Col.*, 241 U. S. 252; *People v. Ricketts*, 94 N. E. 41; *State Pub. Util. Com. v. Bethany Ass'n*, 110 N. E. 334.

Thus the constitutional right of the individual to engage in interstate commerce must be reconciled with the constitutional right or the sovereign power of each state to regulate the public utilities serving its citizens. "It constantly is necessary to reconcile and to adjust different principles, each of which would be entitled to possession of the disputed ground but for the presence of the others." *Hudson Water Co. v. McCarter*, 209 U. S. 349, at 357. These two constitutional rights must be reconciled by a consideration of the principle that "one whose rights are

subject to state restriction cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter." *Hudson Water Co. v. McCarter*, *supra*; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 438; *Manigault v. Springs*, 199 U. S. 473, 480.

In these cases the paramount right of the state to regulate its own public utilities could not give way to the constitutional individual right of contract. In the case at bar the paramount sovereign right of every state to regulate its own public utilities serving its own citizens is not inconsistent with nor can it be superseded by the constitutional right of an individual to import a commodity into the state incidentally or directly used in the service of the public in a business affected with a public interest naturally and inherently subject to state regulation and control.

The reconciling principle is, that it must be presumed that the regulating power will allow just compensation for the imported articles in which event they would flow freely in due course of business into the state. The plaintiff's cause of action was not state action burdening commerce—it was state action confiscating property.

While it is true that the right of interstate commerce includes and embraces the right to sell and that any burden upon the introduction and incorporation of the imported article into and with the mass of property in the state is hostile to the power given to Congress to regulate commerce, yet the importer of such an article has only the right to seek the open market in the ordinary channels of trade. There is no duty devolving upon the state to furnish him a market or to provide ways, means and instrumentalities with which to market his wares, and where his goods are of such a character that he must seek the aid of the state in marketing them or procure the services of licensed agencies and instrumentalities of the state, then he departs from and exceeds the trafficking between states

and submits and becomes subject to regulation by the state. This principle was clearly announced by that great expounder of the Constitution, Chief Justice Marshall, in the early case of *Brown v. State of Maryland*, 12 Wheat. 419, at 443, thus:

"So if he (importer) sells by auction, auctioneers are persons licensed by the state, and if the importer chooses to employ them he can as little object to paying for their services as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation without annexing to it also the privilege of using the officers licensed by the state to make sales in a peculiar way. The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains and ought to remain with the states. If the possessor stores it himself, out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a *public magazine*, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infections or unsound articles is undoubtedly an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state."

So in the case at bar, if the Kansas Natural or its Receiver choose to employ the licensed agency of the state, the Kansas City Gas Company, in the distribution and sale of gas, or if they prefer placing their goods in a public utility business for distribution and sale, they devote them to a public use and submit to state control.

The furnishing of gas or other public utilities to the inhabitants of the city is a state function kindred to building roads and paving streets over which the state alone has control. In *Field v. Barber Asphalt Co.*, 194 U. S. 618,

the claim was made that a Missouri statute was void because it authorized the common council to name the brand of material in paving contracts, thereby excluding an imported asphalt from competition with other asphalts. The Court held (page 622) that while the statute operated to exclude Trinidad Lake asphalt from the State of Missouri, it was a proper and rightful exercise of the state's power; that legislation of a state may in a great variety of ways affect commerce and persons engaged in commerce without constituting a regulation of it within the meaning of the Constitution (*Pa. Rd. Co. v. Hughes*, 191 U. S. 477), and that the right of the state in the exercise of its police power to make regulations which indirectly affect interstate commerce has frequently been sustained.

So in the case at bar, the price of gas to plaintiff is only incidental to the public service, and the right of the state to regulate gas service to its consumers, even to the extent of requiring the furnishing of manufactured gas to the exclusion of natural gas, is a rightful exercise of the state's governmental power of rate regulation of public utilities affected with a public interest.

We further submit that a careful reading of the following authorities demonstrates that before plaintiff can claim that the business of distributing and selling natural gas is interstate commerce he must show that neither himself nor any other party is engaged in the local business of simultaneous, immediate and indiscriminate sale and delivery of natural gas. *Heyman v. Hays*, 236 U. S. 178; *In re Rahrer*, 140 U. S. 545; *McDermott v. Wisconsin*, 228 U. S. 115.

These are liquor cases and involve special Acts of Congress, but they established the fact that when the Kansas Natural Gas Company, either directly or through the instrumentality of distributing companies, splits up its alleged importation of gas into 150,000 parcels and carries these parcels to the consumers' premises and there trans-

acts the business of locally offering for sale, locally selling, locally measuring, locally delivering and locally collecting, it cannot claim to be interstate commerce.

The true conclusion on this head of interstate commerce must be that the Kansas City Gas Company, and other local distributing companies, are public utilities, doing a business affected with a public use, a local state use, subject to the state's uncontrovertible power of state regulation. *The Wyandotte County Gas Co. v. Kansas*, 231 U. S. 622; *State ex inf. v. Kansas City Gas Co.*, 254 Mo. 515; *Manufacturers H. & L. Co. v. Ott*, 215 Fed. 940. And that, in so far as the Kansas Natural or its Receiver are interested or contribute to such local public utility business, they *pro tanto* submit their rights and become subject to state restriction and regulation. *Hudson Water Co. v. McCarter*, 209 U. S. 349. And that all parties dealing and contracting with a public utility, a business affected with a public interest, a business subject to state control, are deemed to do so with knowledge and take notice of and consent to state regulation and control. *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 438; *Manigault v. Springs*, 199 U. S. 473, 480. Even mortgagees loaning money on public utility properties *pro tanto* dedicate their investments to public use, subject to state regulation; and that, when the Kansas Natural Gas Company and its Receivers connected their pipe-lines to the properties of the Kansas City Gas Company, devoted to a public use, and chose to employ a licensed state agency, they departed from and exceeded their constitutional right to import and sell in the open market and dedicated their properties and their product to a public use, subject to public regulation and control. *Brown v. State of Maryland*, 12 Wheat. 419, at 443.

Thus also can the paramount constitutional right of the state to regulate its own public utility service be harmonized with the personal constitutional right to import and sell in the open market.

It follows from the foregoing that the price or consideration paid by the local companies to the Kansas Natural Gas Company and its Receiver for gas is merely an item of operating cost to said local companies to be considered and approved or disapproved by the state commissions in making rates for said local companies; that it must be assumed that said rates are and will be reasonable and compensatory and when this presumption is indulged there is no regulation or burden on interstate commerce and that question becomes immaterial, remote and incidental.

POINT VII.

The Receiver and Kansas Natural Gas Company offered no evidence of any agreement with the local companies to modify their supply-contracts or to increase the price to be paid by the local companies to the supply-company for the gas furnished.

Assuming, without admitting, that the Receiver had a right to maintain an action to enjoin natural gas rates charged and collected by the local companies on the theory that he had a contract or vested right in those rates; the fact remains that there is no evidence (Rec. 786) of any agreement with the local companies to modify their supply-contracts so that the Receiver would participate in the increase. The price realized by the Receiver for his gas is measured by whatever rights the Kansas Natural had under said supply-contracts. Those contracts fixed the price substantially at $62\frac{1}{2}$ per cent of 30 cents, or 18.75 cents per thousand cubic feet for the gas measured at the consumers' meters. This is just as definite and certain as if the contract had read 18.75 cents per thousand cubic feet for the gas measured at the city gates and there assigned, sold, transferred, delivered and set over to the local companies.

Again, any modification of said contract or future arrangement will necessitate a contract between the local company and the Receiver or the owner of said property fixing a price for gas measured either at the city gates or the consumers' meters. Under no circumstances can the Kansas Natural Gas Company ever acquire any right, title or interest in or to the distribution properties or to the rates charged by the local companies.

"Until the question of the abrogation or modification of the contract between the complainant and the producing company should be presented to the Court appointing the Receiver, complainant was not entitled to have enjoined an order of the Missouri Commission prohibiting an increase of its rates." *St. Joseph Gas Co. v. Baker et al.*, 243 Fed. 206-7.

It follows that in any event before the Receiver or the Kansas Natural Gas Company can maintain or even join in a suit to enjoin legislative rates, they must offer in evidence a contract or agreement with the local companies by the terms of which they would legally participate in the increase.

It is fundamental that a party must have an interest in the subject of the action and the relief demanded before he can maintain or join in a suit.

POINT VIII.

The Receiver and Kansas Natural Gas Company offered no evidence of the operating cost or value of the properties of the local companies, used and useful in the natural gas service to the public.

Finally, assuming that all the foregoing infirmities are overcome; and that the entire properties devoted to the production, transportation, distribution and sale of gas are a

unit and that the rates are joint, the fatal weakness of the plaintiff's case remains, to-wit, that he has offered no evidence showing either the operating costs or the reasonable value of the properties of the local companies used and useful in the joint service of furnishing natural gas to the public. Both statements of the evidence agreed to by all the parties are silent as the tomb on the value and operating costs of the distributing companies' properties. The foreclosure bill recites that these properties would be at least \$20,000,000 (Rec. 872) in 1906 when the business commenced and yet they are ignored in fixing an alleged joint rate.

In the opinion (Rec. 563) rendered by the court below, the court said (Rec. 578):

"Considerable evidence was introduced touching the financial status of the various distributing companies, the valuation of their plants, the character and extent of their business, their operating expenses and other allied matters. This evidence was introduced, *not for the purpose of ascertaining with accuracy what would be a just and fair rate to be charged by the various distributing companies*, but solely for the purpose of ascertaining whether there was any reasonable grounds for holding that the Receiver could obtain more than two-thirds of the 28-cent joint rate. This evidence was taken and the inquiry made on the basis of laying aside temporarily the contracts between the Kansas Natural Company and the distributing companies, and without undertaking to pass upon the validity of those contracts as between the original parties. Without reviewing this evidence in regard to these various distributing companies, but after a full and careful consideration thereof, I am clearly of the opinion that there is no reasonable basis for holding that the Receiver could obtain more than two-thirds of the 28-cent joint rate, in case that rate should be established." (Italics ours).

Thus it appears that the hearing was not for the purpose of reviewing a legislative rate, but for the purpose of changing a contract in some undefined way without the consent of one of the parties, and there was no evidence taken or considered or any valuation made or found by the court of the distribution properties in determining the reasonableness of the 28-cent rate. This is fatal to the plaintiff's case under all the authorities.

The record further shows that these pipe-lines were built to carry 120 million cubic feet of gas per day to the markets of Kansas City, Missouri, and Kansas City, Kansas, and other cities; that they consisted of two parallel 16-inch lines from Grabham, Kansas, to Kansas City, Missouri (Rec. 937); that the business originally consisted of furnishing gas for not only lighting and cooking but all domestic and furnace heating in winter and boiler, power and manufacturing uses in summer, thus using said lines to their approximate carrying capacity the year around; that the gas is so far exhausted that it is no longer available in sufficient quantities for heating in winter or for boiler, power and manufacturing purposes in summer and that one of said lines would now be amply sufficient to carry the gas available now insufficient for even domestic uses, that by reason thereof said double pipe-line system with its many thousands of horse-power engines thereon (Rec. 948, map) is no longer used and useful in the service of the public and should not have been included in a valuation for rate making.

CONCLUSION.

In conclusion appellants state that the Receiver and the Kansas Natural Gas Company have wholly failed to prove any legal right or actionable interest in the rates charged by appellants; have failed to show any agree-

ment with appellants to modify said supply-contracts or change the rates charged by appellants to the benefit of the Receiver or the Kansas Natural Gas Company; have failed to prove the operating costs or value of appellants' properties and of 30 or more other local companies used and useful in the service of the public; and have failed to prove the value of that part of their own properties actually used and useful in the service of the public.

It follows that the decree of the trial court enjoining the 28-cent rate and enjoining the regulation of rates by the Public Service Commission of Missouri and the Public Utilities Commission of Kansas, and enjoining the enforcement of said supply-contracts was erroneous and should be reversed and the cause remanded with instructions to deny the relief prayed by plaintiff and the Kansas Natural Gas Company, without prejudice to the rights of these appellants to fix and establish rates for their consumers in conformity with the laws of the states of Kansas and Missouri.

Respectfully submitted,

J. W. DANA,
Solicitor for Appellants.

910 Grand Ave., K. C., Mo.

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**IN THE
Supreme Court of the United States**

Nos. 26160, 26283, 26284, 26323.

OCTOBER TERM, 1918.

No. 277.

The Public Utilities Commission for the State of
Kansas et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural
Gas Company et al.

No. 329.

Kansas City, Missouri, the Public Service Commission of
the State of Missouri et al., *Appellants*,

vs.

John M. Landon, Receiver of the Kansas Natural
Gas Company et al.

No. 230.

Kansas City Gas Company, The Wyandotte County
Gas Company et al., *Appellants*,

vs.

Kansas Natural Gas Company, John M. Landon and
George F. Sharitt, Receivers, and Fidelity
Title and Trust Company.

No. 353.

The Public Utilities Commission of the State of
Kansas et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural
Gas Company et al.

**APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF KANSAS.**

**Petition of Receivers to Modify the Opinion and De-
cree of this Court by Declaring the Effect on
the Receiver of the 28-Cent Rate Order, and by
Affirming the Decrees of the Court Below as to
the Distributing Companies, or in the Alterna-
tive to Permit the Lower Court to try the Valid-
ity of the Orders of the Commissions as They
Affect the Distributing Companies, and the Other
Issues in the Cause not Disposed of by the Opin-
ion of this Court.**



IN THE

Supreme Court of the United States

No. 277.

The Public Utilities Commission for the State of
Kansas et al., *Appellants*,

vs.

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the State of Missouri et al., *Appellants*,

vs.

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No. 230.

Kansas City Gas Company, The Wyandotte County
Gas Company et al., *Appellants*,

vs.

Kansas Natural Gas Company, John M. Landon and
George F. Sharitt, Receivers, and Fidelity
Title and Trust Company.

No. 353.

The Public Utilities Commission of the State of
Kansas et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural
Gas Company et al.

PETITION.

The uncertainty in Judge Booth's mind as to his duty under the clause of the opinion that the "decrees below must be reversed and the cause remanded for fur-

ther proceedings in conformity with this opinion" causes him to approve this action of his Receivers in suggesting to this court that in the event a rehearing is not deemed wise, at least he should be given such direction as is hereinafter indicated.

I.

This court in its opinion says the Receiver cannot challenge the 28-cent rate of the Kansas Commission because he is not directly interested in it, although the rate was made for him by the Commission and on consideration of his business and property. At the conference referred to in our petition for rehearing the purpose to proceed against the Receiver for a refund under the Commission's order of December 10, 1915, was expressed by the Attorney General of Kansas, although that order has the same infirmity as the decree of the District Court and the bill of complaint, as stated by this court, to-wit, it does not affect his business. The 28-cent rate was made in law, as proclaimed in this opinion, for the distributing companies, but in fact was made for the Receiver upon a consideration of his business and his business alone. This is conclusively shown by the opinion of the Kansas Commission, Exhibit K attached to the bill of complaint (Record, p. 53). No evidence was introduced before the Commission on the valuation of the distributing companies' properties or their requirements (See p. 20 of "Brief on Behalf of Various Distributing Companies, Appellees").

A rate cannot lawfully be made for the distributing companies upon a consideration of, *not* their business and requirements, but those of the Receiver, without a hearing on the reasonableness of the 28-cent rate as to them.

If the Receiver has not sufficient interest in the 28-cent rate to challenge it in a court of equity, it cannot be enforced against him for refund, when he has exercised his right to charge higher rates since the date such rate order was enjoined on his complaint. The infirmity in the bill as found by this court (that he was not directly concerned in the rate and could not complain thereof) goes back to the order of the Kansas Commission, and makes that order void because the order was in fact made for him and his business when the Commission had no power to make a rate for him.

II.

The 28-cent rate made for the Receiver, and of which he cannot complain for the reason stated in the opinion, cannot be valid as against the distributing companies, because it was not made for them. There was no evidence taken by the Commission to support the order so far as it related to the distributing companies. The Commission considered the distributing companies as the agents of the Receiver and the 28-cent rate as a *joint rate* to the consumers (Record p. 83), referring to the distributing companies as "their" (the Receivers') distributing companies.

The decree against the Kansas defendants found that the 28-cent rate was confiscatory generally, and then

permanently enjoined it as to the distributing companies as well as to the Receiver (Record, p. 602, paragraphs "Second" and "Fifth"). There were no assignments of error against this part of the decree, no evidence to support the decree in favor of the distributing companies is included in the transcript, and there is no discussion of the matter in appellants' briefs. Neither was any reference made in the oral argument as to the part of the decree granting the injunction in favor of the distributing companies against the 28-cent rate. In this state of the record, the opinion should not be so interpreted as to direct a dissolution of the injunction in favor of the distributing companies. It says in the opinion that it is unnecessary to discuss the effect of rates prescribed for the "latter" (distributing companies) for the Receivers were in no position to complain of them. But the distributing companies were in position to complain, and some did, and obtained a decree enjoining the 28-cent rate. That injunction should not be dissolved even though the Receiver cannot complain, and his injunction be dissolved. The interested parties have a constitutional right to challenge the 28-cent rate. They did so and got an injunction in their favor. It is now claimed that it is the duty of the court below to set aside the injunction under the mandate and opinion. If it does so, the distributing companies should have the right to challenge the reasonableness of the 28-cent rate on a demand for an injunction in this suit.

Either the distributing companies have had their day in court on the question of the confiscatory nature

of the 28-cent rate as to them and the injunction in their favor should not be dissolved, or if the decree as to them is reversed they should be permitted to re-try the question of the confiscatory nature of the 28-cent rate as to them. They should not be penalized for the wrong theory of agency adopted by the Kansas Commission over their objection and be refused a hearing on the confiscatory nature of the rate as to them. Under the case of *Florida, East Coast R. Co. v. United States*, 234 U. S. 167, 34 S. Ct. 867, 872, the evidence introduced against the Receiver will not support an order for a 28-cent rate as to the distributing companies. The order as to them was void. *Interstate Commerce Commission v. L. & N. R. Co.*, 227 U. S. 88, 33 S. Ct. 186; *L. & N. R. Co. v. Finn*, 235 U. S. 601, 35 S. Ct. 146, 149. Under the case of *Arkadelphia Milling Company v. St. L. S. W. Ry. Co.*, 39 S. Ct. 237, . . U. S. . . (decided March 3, 1919), and cases cited, the distributing companies had a right to dispute the validity of the rate order as related to them. To deny them this right in and of itself makes the order of the Kansas Commission void. Any act or procedure that denies to a litigant the right to test an order of the Commission in court makes the order of the Commission and the Act or both unconstitutional. *Chicago, etc. Co. v. Minnesota*, 134 U. S. 418, 460, 10 S. Ct. 462, 702, concurring opinion of Mr. Justice Miller.

III.

Since the 28-cent rate order was directed to the Receiver, he supposed he was attacking it in the court

below, but this court decided he had no right to challenge the order, on the ground that it was not made against him, though it was in fact directed to him. If it was not made against him, it cannot be enforced as against him until he has had opportunity to exercise his constitutional right to test it by judicial review. If the decrees are reversed, the court below should be directed to modify the injunction as to the Receiver and continue it in force as to the distributing companies. As to the Receiver it should provide that the Kansas Commission cannot enforce the order against him, either as to the penalties provided by the Kansas statute or as to the rates, which are inapplicable to him.

The distributing companies attempted to review the order in the trial court and got an injunction against it. This it is claimed the court below should dissolve because of the opinion of this court denying relief to the Receiver. If the distributing companies are to have their injunction dissolved and are denied a trial in the court below, then the distributing companies will have had the 28-cent rate order enforced against them without being permitted to exercise their constitutional right of judicial review.

IV.

In the proceedings below, two issues were framed in relation to the supply contracts, one as to whether they were binding on the Receiver, the other as to whether they were binding on the Kansas Natural Gas Company. The court below decided that the supply contracts were

not binding on the Receiver, and its decree in that respect has been affirmed by this court. The other issue, as to whether they are binding on the Kansas Natural Gas Company, has not been tried, as the court below did not consider it necessary to try that issue in determining the validity of the orders of the Commission. Under the changed conditions brought about by the reversal of these cases, it is necessary to try the issue as to the binding force and effect of these supply contracts on the Kansas Natural Gas Company. But a trial of this issue cannot be had in the court below, without the permission of this court.

We have been thus insistent, because of the fact that the people, the consumers, who are bound to be directly affected, number hundreds of thousands, and improper action may well result in great distress and inconvenience; that the monetary interests of the parties litigant mount into the millions of dollars; that the time consumed in the various trials of the various branches of this litigation has been so great as to approximate a travesty upon justice; and finally, that the expense to all the parties, receivers, distributing companies and cities, is very great.

It is thought by your petitioners that with a few sentences, this court can make perfectly clear the rights of the parties and the duties of the court below in these matters. To permit the trial court to proceed without further guidance is bound to result in the matters being again brought before this court, either upon mandamus or new appeal. The shorter road to a final determina-

tion, we submit, is for this court to so modify the opinion which must be the guide in obeying the mandate, as to remove those doubts which now trouble the trial court and the parties whose rights he is passing upon.

We submit that the injunction should remain in force at least as to the distributing companies, and that the decrees in their favor should be affirmed. If this court does not so order then specific permission should be given to the court below for him to reframe and to try the issues as to the validity of the orders of the Commissions as they affect the distributing companies, and also as they affect the Receiver.

We further ask that the court below be given specific permission to reframe and try the issues as to the validity of the supply contracts above mentioned, and especially as to their binding force on the Kansas Natural Gas Company.

Respectfully submitted,

CHESTER I. LONG,
JOHN H. ATWOOD,
ROBERT STONE,
Solicitors for John M. Landon, Receiver of the Kansas Natural Gas Company.

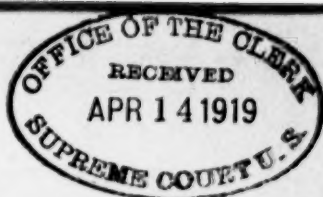
JOHN J. JONES,
*Solicitor for George F. Sharitt,
Receiver of the Kansas Natural
Gas Company.*

State of Missouri, County of Jackson, ss.

We hereby certify that in our opinion the foregoing petition is well founded in fact and in law, and not made for delay.

CHESTER I. LONG,
JOHN H. ATWOOD,
ROBERT STONE,
JOHN J. JONES





IN THE
Supreme Court of the United States

Nos. 26160, 26283, 26284, 26323.

OCTOBER TERM, 1918.

No. 277.

The Public Utilities Commission for the State of
Kansas et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural
Gas Company et al.

No. 329.

Kansas City, Missouri, the Public Service Commission of
the State of Missouri et al., *Appellants*,

vs.

John M. Landon, Receiver of the Kansas Natural
Gas Company et al.

No. 230.

Kansas City Gas Company, The Wyandotte County
Gas Company et al., *Appellants*,

vs.

Kansas Natural Gas Company, John M. Landon and
George F. Sharitt, Receivers, and Fidelity
Title and Trust Company.

No. 353.

The Public Utilities Commission of the State of
Kansas et al., *Appellants*,

John M. Landon, as Receiver of the Kansas Natural
Gas Company et al.

APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF KANSAS.

**PETITION FOR REHEARING BY KANSAS
NATURAL GAS COMPANY.**

IN THE

Supreme Court of the United States

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Kansas et al., *Appellants*,

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PETITION FOR REHEARING BY KANSAS NATURAL GAS COMPANY.

The receiver under the opinion of this court is held
"Free from unreasonable interference by the state,"
"under no compulsion to accept unremunerative prices,"
not bound by the original supply contracts, and engaged

in interstate commerce to the gates of the cities. This would seem to give him complete relief but because the orders complained of fix rates at the burner tips he is held to be in no position to complain of them. For this reason it is claimed by the cities and commissions that no injunction as to business, either in the past or future, should issue in his favor. Since the granting of the temporary injunction increased rates have been collected by the distributing companies, of which the receiver has received his proportion. If the injunctions fall it is claimed by the cities and the commissions that a refund of all excess so collected, amounting to over three million dollars, must be paid back by the distributing companies and the receiver. If that construction of this court's opinion be correct the property of the Kansas Natural will be confiscated and a great substantial wrong will be permitted.

There are four distinct classes of litigants involved in these cases. (1) The Kansas Natural, its receivers and creditors; (2) the distributing companies; (3) the Public Utility Commissions of two states and the cities; (4) the consumers of gas. These four classes of litigants place divergent and irreconcilable construction upon the opinion in question. So divergent were their views that the trial court, Honorable Wilbur F. Booth, propounded a questionnaire and summoned a conference. More than fifty representatives of the different parties assembled and attempted to answer the following questions which had been propounded by him:

"My dear Sir:

Enclosed herewith is a copy of the opinion of the Supreme Court on the appeals in the Gas case. At the suggestion of a number of attorneys interested, an informal conference will be held April 3rd, 1919, to discuss various questions which now arise, among others:

1. What 'further proceedings in conformity with this opinion' should the court take?
2. Does the Supreme Court decision furnish any basis for a claim of refund at this time from either the Receiver or the Distributing Companies?
3. Does your client anticipate filing a petition for a rehearing, and, if so, along what lines?
4. In view of the decision, what status does your client now occupy in relation to the receiver?
5. Is there any reason why the receiver should not now fix a schedule of rates at the city gates?
6. In view of the decision, is not the time opportune for a full and amicable adjustment of all controversies between the parties.

A frank expression of views from all parties is desired.

In case you cannot be present, a communication by letter will be appreciated.

Very truly yours,

W. F. BOOTH."

Two days' discussion brought neither harmony among the litigants nor enlightenment to the court. Each party claimed that by proper interpretation of the opinion its contentions were sustained.

The record in this case is voluminous. The facts involved are exceedingly complicated. The method of business is *sui generis*, the business of the receiver is partly mining, partly producing, partly merchandising,

and largely transportation. It partakes of but is not in reality a public utility unless it be held that the receiver is selling to the ultimate consumer.

It is not strange that this court, cutting through the maze of facts, figures and methods of doing this peculiar sort of business, should arrive at the ultimate legal proposition of interstate commerce to the gates of the cities and feel that that conclusion solved all the questions in the suit.

The Kansas Natural more than anyone else is vitally interested in maintaining the integrity and usefulness of its property, and in view of the situation most respectfully requests this Honorable Court to grant a rehearing in order that substantial as well as technical justice may be attained.

In support thereof it submits the following:

I.

The receiver is engaged in interstate commerce to the burner tips. He has never adopted the original supply contracts. His relations to the distributing companies are those established by his business practice.

In its opinion this court says:

"Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods."

It has been the almost universal method of selling natural gas for the producing and transporting company to supply the ultimate consumer on exactly the plan

followed by the receiver in this case. That is, the gas passes directly and continuously from the mains of the supply company into the lines of the distributing companies to the burner tips. The propulsion which makes distribution to the consumer possible, is given to the gas by the supply company (in this case the receiver) before the gas enters the distributing lines. The title to the gas remains in the supply company until it is burned; the supply company receives pay only for gas delivered to the consumer and paid for by him; the gas lost in transportation through the distributing as well as through the supply pipes is the loss of the supply company. The uncollected bills are its loss. The service from well to burner tip is a continuous and single service, consisting largely of transportation, and the rates charged are joint rates. The distributing company receives for its service a certain percentage of the gross amount collected, and in consideration thereof furnishes the distributing lines and equipment, as well as service in connection therewith. This is an essential part of the method of doing business and is not a mere device for providing the manner of payment for gas delivered by the supply company to the distributing company.

Not only is the above the uniform method of selling natural gas, but because of the varying pressure incident to the transportation of large quantities of gas through the main lines and the varying temperature of the weather, at least up to the time of the commencement of this action, there had never been devised satisfac-

tory meters which could measure the gas as delivered from the transportation lines into the distributing system.

The Utilities Commission of Kansas (Brief of Appellant, P. U. C. p. 6), and the Supreme Court of Kansas (*State v. Flannelly*, 96 Kan. 372), found that this relation was one of agency and not of vendor and vendee.

This court, speaking of the receivers, said:

"In fact they lack authority to engage by agents or otherwise in retail transactions carried on by the local companies."

This court cannot mean by this statement that the charter of the Kansas Natural would not permit it to acquire franchise rights because that right, under its charter has never been questioned and is not at issue. It has every power and authority so to do and exercises that right without question in the distributing plant at Independence, Kansas.

The peculiar nature of the gas business and the practical and known commercial method of carrying it on as above described make it almost vital that the relation between the producing company and the distributing company should be that of principal and agent. That well recognized and well established relation was not recognized by this court because this court's attention was not particularly directed thereto by counsel. It was not in serious dispute. The Utilities Commission recognized it and the orders complained of were based upon that premise. The Supreme Court of the State of Kansas had

adopted that view of the relation and the attorneys for the Public Utilities Commission, not only throughout the hearing, but in their brief in this court (see Brief of Appellant, P. U. C., p. 6), stated it in the following words:

"The gas sold in Kansas is delivered to the consumer thereof in the several cities by distributing companies operating under franchises obtained by the distributing companies from the cities, fixing the rates charged customers for gas. These distributing companies act as agents for the Kansas Natural Gas Company in the distribution and sale of gas. The price received for gas is divided between the distributing companies and the receivers on a percentage basis. The gas is not sold by the receivers to the distributing companies. It is delivered from the pipe lines of the Kansas Natural Gas Company, under the control of the receivers, into the pipe lines of the distributing companies, and is through these pipe lines conveyed from the pipe lines of the Kansas Natural Gas Company to the consumers."

We believe that this well established and known commercial method followed by the receiver should be recognized by this court so that the entire business might be protected from unreasonable interference by the state.

II.

The order of December 10, 1915, was an order directed to the receiver and not to the distributing companies. While couched in permissive language, it fixes maximum rates which, under the statutes of Kansas, cannot be exceeded without incurring the penalties re-

ferred to below. This statute is set out at page 20 of the record and is found in Section 38, Chapter 238 of the Sessions Laws of 1911.

This order the receiver was compelled either to obey or disobey. If he obeyed, the confiscation of his property was inevitable because the rate fixed was not adequate to yield a return. If he disobeyed, and he was held to be wrong, he would be subject to the severe penalties of the statute set out in Paragraph 17 of the bill of complaint. This order directed to him was issued by a state board, with all of the authority of the state to compel its enforcement, with an assumption of authority to compel obedience by receiver under the claim that he was under their jurisdiction.

The receiver was engaged in interstate commerce and, as stated by this court, he was "under no compulsion to accept unremunerative prices." He "might sell and deliver gas so transported to local distributing companies, free from unreasonable interference by the state," but it does not follow that he could defend himself by force of arms against a police officer of Kansas who might come to arrest him for violation of the Kansas laws; nor that he should incur the risk of several millions of dollars of fines for violating this order of the Commission by putting in his own rate at the gates of the city. The fact that he was engaged in interstate commerce free from state regulation and not obliged to accept unremunerative prices is the very situation which entitled him to the injunction which he obtained against the commission. He had a right to choose his forum

and to ask the protection of a court of equity instead of violating the order and subjecting himself to possible punishment by summary proceedings brought by the commission to enforce the extraordinary, exorbitant and confiscatory fines provided by the statutes of Kansas (Rec. pp. 20 and 31).

The receiver chose the only safe course. The Supreme Court of the state had held that the interstate character of his business was ended when he "broke the package" and made his first sale of gas in Kansas. (*State v. Flannelly*, 96 Kan. 372.) The commission was further claiming that even though his business was interstate, it was not national, but local, and therefore under its control. No prudent man in charge of a great estate would risk its complete confiscation, even on advice of counsel, by defying the state without the protecting arm of the court.

For three years under that protection he has collected rates in excess of two-thirds of 28 cents. If now this court withdraws the protection granted by the lower court, it has been publicly threatened in press and in open court, that the receiver will be compelled to refund to the consumers all of the excess above his portion of the 28-cent rate. This will amount to nearly two million dollars and the confiscation sought to be averted will have been accomplished.

When the preliminary injunction was granted by the enlarged court the receiver was required to furnish a bond for \$750,000, conditioned that "in case the injunction decreed here shall be adjudged to have been im-

providently issued by the final decision of that question, he will pay back to each of the consumers of the gas he furnishes herein the excess paid by such consumers therefor above what he would have paid at the rates fixed by the order of the commission of December 10, 1915." It is claimed that there will be a liability on this bond under that condition if the injunction granted by the lower court is not sustained.

The Commission of Kansas still claims jurisdiction over the receiver (Brief, pp. 25, 28, 31, and Rec., pp. 186, 605, 745, 766), and in the conference reiterated the claim that it has power to fix a rate at which the receivers shall sell gas to the distributing companies at the gates of the city.

Under these circumstances we respectfully suggest that the injunction in favor of the receiver should be sustained.

III.

In its opinion this court says "The challenged orders related directly to the price of the gas at the burner tips and only indirectly to the receiver's business," and, "The receivers were in no position to complain of them."

This court evidently overlooked the fact that the rates established by the challenged orders were joint rates and as such are directed to the receiver (Rec. 83 and 85). The receiver asked permission of the commission to file his own rate at the gates of the city. This is stated in the commission's opinion of July 16, Exhibit H, attached to plaintiff's bill of complaint, where the commission says :

"On April 26, 1915, however, there was filed with the commission a document which may be regarded as an amendment to the complaint, in which the commission was requested to establish and make effective a schedule of rates to be collected from the distributing companies for natural gas delivered at the gate of each plant. This schedule of rates was constructed upon the distance plan, and varied from 13 1/3 cents per thousand cubic feet for gas delivered at Coffeyville, on the Oklahoma border, to 29 cents per thousand cubic feet for gas delivered at Atchison. As, however, this schedule was subsequently abandoned and superseded by another, no further attention need be given it."

This application was abandoned and superseded by another because the commission refused to consider any rate except a joint rate to the ultimate consumer. This position was taken by the commission in order to maintain its jurisdiction over the local distributing companies as well as the receiver. The Commission Law of Kansas, Chapter 238, 1911, provides that any utility operating in only one city shall not be under the supervision of the commission. By considering the Kansas Natural gas business as one whole plant and the distributing companies its agents the commission claimed power to extend its jurisdiction over the whole system. Under this compulsion the receiver filed his joint schedule.

The rate fixed by the order of December 10th was a joint rate. The cost of the gas in the field was a comparatively small item. At the time this rate was fixed it was only six or eight cents per thousand. The principal cost to the consumer is the cost of transportation all the

way from the well to the burner tips. The twenty-eight cent rate is the fixing of an interstate rate and therefore is a direct burden upon interstate commerce.

IV.

This court in its opinion says that the "interstate movement ended when the gas passed into the local mains." Admitting that to be true, it does not necessarily follow that because the lower court adopted the contrary view the conclusion that the commissions were interfering with the establishment of compensatory rates by the receiver was an erroneous conclusion. The fact is that the direct result of the orders of the Public Utilities Commission, if followed out and enforced, would result in the complete destruction of the receiver's property. His customers are limited to the few distributing companies that serve the several cities. He has no other possible use for his plant which has cost millions to install. If those patrons are taken from him his property must be junked.

What amounts to a direct burden upon interstate commerce depends upon the conditions in the case at hand. In this case the receiver is operating an expensive plant, a plant which cost millions of dollars, constructed for the express purpose of transporting gas from Oklahoma into Kansas and Missouri. He cannot supply gas at the gates of the respective cities for less than all of the 28 cents. The commission has fixed a rate of 28 cents to the ultimate consumer, to include compensation both to receiver and distributor. His only customers

therefore are absolutely unable to buy of him. The effect of the order is as direct, potent and disastrous as though it were an order prohibiting the importation of gas at the state line.

V.

The 28 cent rate, that is the challenged order is void. The commission had no authority to fix a rate for the receiver's interstate business, but the receiver's interstate business constituted the basis for two-thirds of the 28 cent rate. It was an attempt directly to burden the interstate commerce of the receiver, and the whole rate therefore must fall.

VI.

The rate complained of was challenged not only by the receiver but by this appellee (Kansas Natural Gas Company) and by several of the distributing companies, which answered, praying similar relief as the receiver. Those distributing companies contended that the 28 cent rate was confiscatory as to them and prayed that it be enjoined.

VII.

It has never been held that, when a telegram reaches the pole line constructed in accordance with the franchise granted in a local city, or when a traveler or a package arrives on a section of a railroad built under the terms of and in accordance with a franchise from a local community, that the character of the interstate service changed in any respect merely because the local

right to use a private property of the city had been entered upon. But, on the other hand, it has been distinctly decided that the use of local franchises does not change interstate commerce into intrastate commerce.

Ticker cases, 38 Sup. Ct. Rep. 438 (Western Union Co. v. Foster).

Wherefore, your petitioner now respectfully prays that a rehearing be granted in the above entitled suits.

R. A. BROWN,
T. S. SALATHIEL,
*Solicitors for Kansas Natural Gas
Company, Appellee.*

State of Missouri, County of Jackson, ss.

We hereby certify that in our opinion the foregoing petition is well founded in fact and in law, and not made for delay.

R. A. BROWN,
T. S. SALATHIEL,
*Solicitors for Kansas Natural Gas
Company, Appellee.*

Supreme Court, U. S.
W. D. P.
APR 16 1918
JAMES D. NAHER,
CLERK.

In the
Supreme Court of the United States
October Term, 1918.

No. 330.

(Submitted and Considered in Nos. 227, 329 and 353.)

KANSAS CITY GAS COMPANY, THE WYANDOTTE
COUNTY GAS COMPANY ET AL., *Appellants*,

VS.

KANSAS NATURAL GAS COMPANY, JOHN M. LAN-
DON and GEORGE F. SHARITT, Receivers, and
FIDELITY TITLE & TRUST COMPANY,
Appellees.

Filed January 14, 1919.

*Appeal from the District Court of the United
States for the District of Kansas.*

Petition of Kansas City Gas Company, The Wyandotte
County Gas Company and Chicago Light, Heat & Pow-
er Company (1) for leave to file bills below in the na-
ture of bills of review or bills to suspend or avoid the
operation as to these parties of the orders and decrees of
said court entered under the mandate, and for affirmative
relief; (2) or, for direction to the court below to construe
the opinion to preserve and protect the rights of these
parties; (3) or, for a rehearing—and brief supporting
same.

J. W. DANA,
Solicitor for Petitioners.

910 Grand Ave., K. C., Mo.

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operation as to these parties of the orders and decrees of
said court entered under the mandate, and for affirmative
relief; (2) or, for direction to the court below to construe
the opinion to preserve and protect the rights of these
parties; (3) or, for a rehearing—and brief supporting
same.

To the Honorable Justices of the Supreme Court:

Now come the Kansas City Gas Company and
The Wyandotte County Gas Company, appellants
in the above entitled cause and appellees in cases

Nos. 227, 329 and 353, and the Citizens Light, Heat & Power Company of Lawrence, Kansas, appellee in said last mentioned cases, and represent and show to the court that they are and were defendant distributing companies in the case entitled *John M. Landon, Receiver, v. Public Utilities Commission of Kansas et al.*, No. 136-N, in the court below; that they and other distributing companies similarly situated sought to file pleadings and offer evidence in their own behalf in said cause and court for the purpose of showing that the rates fixed and maintained in force and effect by the ordinances of their respective cities and by the Public Utilities Act of Kansas and Public Service Act of Missouri and by the orders of the Commissions of said states were at the commencement of said suit and during the trial of said suit confiscatory of the property of these petitioners and denied these petitioners due process of law in violation of the Fourteenth Amendment to the Constitution of the United States; that these petitioners were denied the right so to do upon the mistaken theory that the Kansas Natural Gas Company and its Receivers were the principals or real parties in interest entitled to prosecute said suit in the court below against said confiscatory rates and that these distributing companies were mere agents or instrumentalities of the Receivers in the distribution and sale of said gas to the ultimate consumers; that in the opinion (Rec. 563) rendered by the court below it said (Rec. 578): "Considerable evidence was introduced touching the financial status of the various distributing companies, the valuation of their plants, the character and extent of their business, their operating

expenses and other allied matters. *This evidence was introduced, not for the purpose of ascertaining with accuracy what would be a just and fair rate to be charged by the various distributing companies, but solely for the purpose of ascertaining whether there was any reasonable grounds for holding that the Receiver could obtain more than two-thirds of the 28-cent joint rate."*

That your petitioners, together with many other distributing companies, were brought into said court by process and made parties defendant upon the assumed claim of right of the Receivers to control the price of gas to said distributing companies and to control the selling rate of gas to the ultimate consumer, and that your petitioners were never allowed an opportunity to make a proper case in their own behalf.

That notwithstanding the foregoing facts, the enlarged court on June 3, 1916, Justices Sanborn, Booth and Campbell, issued a temporary injunction (Rec. 294) running in effect in favor of your petitioners and finding that the rates fixed by the Public Utilities Act of Kansas for your petitioners on January 1, 1911 (Rec. 295), and also the rates ordered by the Public Utilities Commission of Kansas on December 10, 1915 (Rec. 296), for your petitioners, were and are unreasonably low and confiscatory and temporarily enjoined the same; that thereafter, on July 5, 1917, said temporary injunction was made permanent as against the Kansas defendants and a final decree entered specifically enjoining said rates in favor of The Wyandotte County Gas Company and other defendants seeking the same relief (Rec. 602, 603); that thereafter said temporary injunc-

tion was made permanent and a final decree entered as against the Missouri defendants (Rec. 621) and specific relief granted to your petitioner, the Kansas City Gas Company, enjoining the rates in force in Kansas City, Missouri, as confiscatory, and finding that the Public Service Commission Act of Missouri, providing for the suspension of schedules of rates filed by, for and on behalf of distributing companies for 120 days and then for six months and then for thirty days, making eleven months, without a hearing, "together with the construction placed upon said Public Service Commission Act by said Commission and the acts and proceedings of said Commission thereunder, as hereinbefore set forth, constitute the taking of the property of * * * the distributing companies above named without due process of law and without just compensation and deny to * * * said distributing companies the equal protection of the law, all in contravention of the Constitution of the United States " (Rec. 623), and thereupon enjoined the operation of said statute and orders of suspension in favor of your petitioners and other distributing companies.

That in a public but informal and unofficial conference called and held by the judge of the court below and counsel representing all the parties in interest, the court on request and for the benefit of all parties expressed the view that the direction by this the Supreme Court that "the decrees below must be reversed and the cause remanded for further proceedings in conformity with this opinion" requires the trial court to reverse said decrees in so far as they grant any relief to your petitioners and other defendant distributing

companies and that said court will be powerless to entertain the cross-bills or applications of your petitioners and other defendant distributing companies for any relief against said confiscatory rates notwithstanding the fact that said decrees were reversed on the sole ground that the "Receivers were in no position to complain of" the rates charged by reason of the "relation between said Receivers and the local companies."

Your petitioners further show to the Court that the temporary injunction of the enlarged court enjoined and prohibited your petitioners from putting or maintaining in effect said confiscatory rates: "That because the rates above specified are non-compensatory, unreasonably low and confiscatory the * * * Commission * * * and *all the other parties to this suit* interested in such rates * * * be, and they are hereby, enjoined and prohibited, * * * from putting or maintaining in effect, * * * any of said rates * * *" (Rec. 296). That the decree against the Kansas defendants permanently enjoins your petitioners from putting and maintaining in effect said rates: "Sixth. That the Public Utilities Commission of the State of Kansas * * * and *all other parties to this suit* * * * are hereby permanently enjoined and prohibited from putting into force or maintaining in effect * * * the rates prescribed by the Commission's order of December 10, 1915, or the rates in force January 1, 1911, prescribed by Sec. 30, Chapt. 238 of the Laws of Kansas, 1911, or any other rates hereafter prescribed by said Commission * * *" (Rec. 603). The decree against the Missouri defendants likewise enjoins your petitioners from putting or maintaining in effect the

existing rates: "Seventh. * * * and the defendant distributing companies are permanently enjoined from * * * interfering with plaintiff in establishing and maintaining such rates as this court has approved or may hereafter approve for consumers of natural gas in Kansas and Missouri." (Rec. 625).

It follows from the foregoing that all existing rates were suspended and your petitioners were powerless to go to the Commissions to obtain new rates and were bound by said injunctions to put into effect rates promulgated by the Receivers and approved by the court below, and that thereafter your petitioners did put into effect certain rates; that the reversal of said orders in so far as they grant relief to these petitioners without further proceedings will subject your petitioners to a vast multiplicity of civil suits by consumers of gas and penal and criminal suits by the Commissions, and if successful will bankrupt your petitioners and confiscate their property to public use without a hearing in court, without due process of law and in violation of the 5th and 14th Amendments.

That the rates charged by your petitioners with the approval of the court below have been reasonable, just and favorable to the consumers and not even sufficient to afford a 6 per cent. return on the property of your petitioners used, useful and required in service to the public.

That the Commissions and Cities did not perfect and prosecute appeals from the decrees of the court below *in favor of your petitioners* enjoining said rates in their behalf and did not assign said decrees as error and did not perfect or bring up to

this court any sufficient record to show that said decrees *in favor of your petitioners* were erroneous; from which it follows that in so far as said decrees granted relief to your petitioners and others similarly situated they should be affirmed and not vacated by the court below; but said court entertains the view that the opinion and mandate of this court will require the reversal of said decrees in favor of your petitioners.

That the court below has all the parties in interest before it and has jurisdiction of the subject matter of the controversy under Sec. 56 of the Judicial Code as ruled by this court in the opinion, and is in a position to hear the application of your petitioners and to grant proper relief in the premises.

Your petitioners further state that at said conference between the court below and counsel, the court expressed the view that upon the coming down of the mandate the court below would, in conformity with the opinion of this court as construed by the court below, enter a final order holding and decreeing that said supply-contracts existing between the Kansas Natural Gas Company and your petitioners were not binding upon the Receivers at the time of the entering of the decrees appealed from and would issue a permanent injunction against your petitioners attempting to enforce said supply-contracts against the Receivers or the trust estate resulting in the shutting off of gas to your petitioners and leaving said cities without a supply; and that the court would be powerless to entertain any application by your petitioners or accept any proofs to show whether or not said contracts had been adopted by the Receivers by im-

plication and by their course of business or whether or not there were legal or equitable grounds for the disavowal and rejection of said contracts at the time of entering of said decrees or at the present time.

Your petitioners, the Kansas City Gas Company and The Wyandotte County Gas Company, respectfully submit that they assigned as error the decree of the court below holding that "said supply-contracts were not binding upon the Receivers" (Assignment No. 3, Brief, 41, 53; Record 710, 718); that they contended in their arguments and briefs that the Receivers' price for gas is contractual and that they had no legal or actionable right, title or interest in the rates charged by said local companies to their patrons (Brief 69 to 77), which view seems to have been approved by this court, "the Receivers were in no position to complain of them" (Opinion, 5); and that the question of whether or not said contracts had been adopted by implication and course of dealings or whether or not there were any legal or equitable grounds for their disavowal and rejection were still reserved to and pending in the court below (Brief 69 to 77); and your petitioners state that there never has been a hearing in the court below either in the case of *John M. Landon v. Public Utilities Commission* or in *Fidelity Title & Trust Co. v. Kansas Natural Gas Company*, the foreclosure suit upon which it is dependent, upon the question as to whether or not said contracts have been adopted by implication and course of dealings of the Receivers with the distributing companies or the question of the legal or equitable right of the Receivers or the court in the interest of cred-

itors or otherwise to disavow and reject said contracts, and that, if the court below should now enter its final order on the coming down of the mandate holding that the contracts were not binding upon the Receivers and thereby disavowing and rejecting the same, such order would be without a hearing and a denial of due process of law to your petitioners in violation of the 5th and 14th Amendments; and your petitioners are advised by counsel and believe that such an order would not be in conformity with the views expressed in the opinion of this the Supreme Court for the reason that said decrees are reversed upon the ground that the Receivers were in no position to complain of the rates charged by the distributing companies because the relation between the Receivers and the local companies was contractual and that such relation was created by said supply-contracts between the Gas Company and the local companies and continued in force and effect by the Receivers and existed at the time of entering of said decrees, and that while said contracts may not have been adopted and were "subject to rejection" at the time of entering the decrees below they had not been rejected and the matter of their adoption or rejection and binding force and effect on the Receivers was still open for adjudication; that said enlarged court when issuing said temporary injunction said: "It has not been and is not necessary for this court as at present constituted to determine the validity of the city ordinances, the contracts between the cities and the distributing companies, the contracts between the distributing companies and the Natural Gas Company *and the duties and obligations of the Receiver under them* in order

to adjudicate the issues it was constituted to decide and for that reason no opinion is expressed or adjudication made concerning them" (Rec. 311); and that the evidence in regard to the financial condition of the distributing companies "was taken and the inquiry made *on the basis of laying aside temporarily the contracts between the Kansas Natural Company and the distributing companies*, and without undertaking to pass upon the validity of those contracts as between the original parties" (Rec. 578); and that the final decree against the Kansas defendants specifically provided: "Nothing contained in this decree, nor in the opinion upon which it is based, shall be construed as determining the * * * status of the distributing companies' contracts in Kansas or Missouri" (Rec. 604); that notwithstanding the foregoing and without any proofs, or hearing, and while the Receivers were still furnishing gas and accepting payments according to said contracts, and had made no agreement with your petitioners to modify the same, the court below in its decree against the Missouri defendants, held: "That the following described contracts heretofore existing between the Kansas Natural Gas Company or its predecessors and the defendant distributing companies or their predecessors *are not* binding upon the plaintiff" the Receiver, naming the contracts. By reason of all of which the decree holding that said contracts were not binding upon the Receivers has been reversed or said matter is still open for adjudication by the court below.

Wherefore, the premises considered, your petitioners pray this Honorable Court:

1. To issue its mandate to the court below spe-

cifically directing said court to affirm those parts of its decrees granting affirmative relief to your petitioners and other Distributing companies similarly situated enjoining as confiscatory the rates of your petitioners in force at the time of entering said decrees; and specifically directing said court to reverse that part of its decrees holding that said supply-contracts are not binding upon the Receivers; or

2. To grant leave to your petitioners and other distributing companies similarly situated to file in the court below in case No. 136-N and No. 1-N on which it is dependent, bills or supplemental bills in the nature of bills of review or bills to suspend or avoid the operation of the order of this court reversing said decrees of the court below as to these distributing companies, and for the purpose of determining whether or not the Receivers had, by implication and course of dealings, or otherwise, adopted said supply-contracts or whether or not any legal or equitable grounds existed at the time of entering said decrees or thereafter to justify the disavowal and rejection of said contracts. A copy in form and substance of said proposed bills is hereto attached, marked Exhibit A and made a part hereof.

3. Or, grant your petitioners and others similarly situated a rehearing or such other proper and appropriate orders as to this Honorable Court may seem equitable and just to the end that the rights of your petitioners may not be prejudiced by the orders of the trial court spreading the mandate of this court in conformity with its opinion.

J. W. DANA,
Solicitor for Petitioners.

State of Missouri, County of Jackson—ss.

J. W. Dana, being first duly sworn, deposes and says that he is counsel for petitioners in the above entitled cause; that he has dictated and knows the contents of the foregoing ~~petition~~ ^{and knows the contents of the} petition; that he is personally familiar with all the facts therein alleged and that the same are true except such as are made on information and belief, and as to them he believes them to be true.

J. W. Dana

Subscribed in my presence and sworn to before me this ^{12th} day of April, 1919.

E. A. Terpening

Notary Public within and for
Jackson County, Missouri.

(Seal)

NOTARY PUBLIC, EXPIRES OCT. 23, 1922

Certificate.

This is to certify that the above and foregoing petition is not filed for vexation or delay but is filed because the petitioners feel themselves aggrieved by the opinion of the court as interpreted and construed by the court below in his views expressed in conference.

J. W. DANA.

Solicitor for Petitioners.

Exhibit "A."

In the District Court of the United States for the
District of Kansas. First Division.

John M. Landon, Receiver of Kan-
sas Natural Gas Company, Plain-
tiff,

vs.

No. 136-N

Public Utilities Commission of
Kansas, et al., Defendants.

**Bill in the Nature of a Bill of Review to Suspend
and Avoid the Operation as to The Kansas
City Gas Company* of the Orders and
Decrees Herein Entered Under the
Mandate, and for Affirmative
Relief.**

Now comes the defendant Kansas City Gas Company, hereinafter the Company, and by leave of the United States Supreme Court files this its bill in the nature of a bill of review to suspend and avoid the operation of the orders and decrees herein entered under the mandate and for affirmative relief in its own behalf, and for its cause of action, complaint and grounds for relief against the plaintiff John M. Landon and the defendant George F. Sharitt, Receivers of the Kansas Natural Gas Company, hereinafter the Receivers, and against the defendant Kansas Natural Gas Company, hereinafter the Gas Company, and against the defendant Public Service Commission

*Leave is asked to file similar bills on behalf of The Wyandotte County Gas Company and Citizens Light, Heat & Power Company and copies will not be set out.

of Missouri, hereinafter the Commission, and the defendant City of Kansas City, Missouri, hereinafter the City, states and avers the following facts, to-wit:

1. That this bill and the above entitled case are ancillary to and dependent upon the foreclosure suit entitled *Fidelity Title & Trust Company v. Kansas Natural Gas Company et al.*, No. 1-N consolidated with No. 1351, pending in this court, and this bill is filed for the purpose of protecting the property now in the possession of this court and in aid of the jurisdiction of this court in said case to the end that equity and justice may be done to all the parties now before the court.

2. That this Company is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri and a citizen and resident of said state.

3. That the Receivers are the duly appointed, qualified and acting Receivers of the Gas Company, appointed by this court and are citizens and residents of the State of Kansas; that the Gas Company is a Delaware corporation; that the Commission is the Public Service Commission of the State of Missouri clothed with power of rate regulation; and that the City is a municipal corporation of said State.

4. That the matter in controversy herein, exclusive of interest and costs, exceeds the sum or value of three thousand dollars and this suit is of a civil nature in equity to enjoin confiscatory gas rates fixed by the City and Commission under authority of the State of Missouri for this Company, and to adjudicate rights, accounts and rates made, accrued and collected under the mandatory orders

of this court, and arises under the Constitution of the United States and the 5th and 14th Amendments thereof, providing that no person shall be deprived of property without due process of law nor shall private property be taken for public use without just compensation; and that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

5. That the Company owns, maintains and operates a gas plant in said City and is engaged in the business of purchasing, distributing and selling natural gas to said City and its inhabitants and occupies the public ways of said City for such purpose under authority duly granted so to do; and that its selling rates for gas are not contractual but subject at all times herein complained of to reasonable regulation by the Commission.

6. That during the years 1904-1908 the Gas Company and its predecessors and this Company and its predecessors entered into certain gas-supply-contracts under which the Gas Company undertook to supply this Company with gas for ultimate sale to this Company's consumers and to accept therefor a definite proportion of the gross amounts paid by such consumers at certain named rates as its compensation for the gas furnished; that said contracts continued in force and effect and gas was furnished thereunder by the Gas Company and received and paid for by this Company until October, 1912, unquestioned and unchallenged by either of the parties thereto.

7. That on October 9, 1912, when this court appointed Receivers for the Gas Company, said Receivers took over the Gas Company's property, affairs and business and operated them under orders of the court without specifically adopting or disavowing said supply-contracts and continued to deliver gas to this distributing company and to accept payments therefor as originally agreed, and said Receivers have continued so to do without any agreement by this Company to modify said contracts from the date of their appointment to the present time; and the Company avers that no legal or equitable grounds now exist for the disavowal by the court or rejection by the Receivers of said supply-contracts; that by reason thereof and the orders of this court and the equities of the parties in interest said Receivers have adopted said contracts by implication, acts and conduct and are now estopped and barred to deny the binding force and effect thereof; and that irrespective of whether or not said contracts are subject to rejection at this time, they are and have been, since the appointment of said Receivers, the only measure of the rights and liabilities of said Receivers and could not be varied or modified without the consent of this Company.

8. That the available gas has diminished, pipelines to new fields have become necessary, operating costs have increased, and the Receivers' income under said contracts was and is inadequate for their demands, and that this Company has no other source of supply of natural gas, by reason of which this Company has long recognized the business necessity of modifying said contracts in favor of the Receivers and the

Gas Company, and is now and long has been willing to enter into negotiations for such modification; but neither the Gas Company nor the Receivers have indicated any willingness to negotiate a modification of said contracts, but have assumed the right notwithstanding said contracts to dictate to this Company both its buying price and its selling rate for gas.

9. That on and prior to November 19, 1916, this Company's selling rate for natural gas was 30 cents net per thousand cubic feet as ordered and allowed by the Commission and the City, and said City and Commission have heretofore always refused to allow and opposed any increase over said 30-cent rate. True and correct copies of ordinance 33887 of said City and the order of said Commission fixing said 30-cent rate are filed herewith, marked Exhibits A and B, and made a part hereof.

10. That sections 69, subdivision 12, and 70 of the Public Service Commission Act of Missouri authorized said Commission to suspend natural-gas-rate-schedules filed with it and defer the use of rates and modified supply-contracts for a period of 120 days or four months beyond the 30 days' time when such schedules would otherwise take effect by operation of the Act; and further authorized said Commission to extend the time of suspension for a further period of six months and for a further period of thirty days during the publication of such schedule, constituting at least eleven months during which time a public utility may be denied a hearing and denied compensatory rates; and this Company avers that said Commission has exercised such power conferred upon it by

statute in numerous cases and at the time of commencement of the above entitled suit threatened to and would have suspended a schedule asking for compensatory rates filed by the Company; and that on April 9, 1919, said Commission did strike from its files the 60 and 80-cent schedules of rates heretofore filed by this Company with said Commission, which had taken effect by operation of the Public Service Commission Act and were put in force by leave and order of this court.

11. The Company avers that said ordinance 33887 fixing said 30-cent rate and said order of the Commission fixing said 30-cent rate and said Public Service Commission Act providing for said eleven months' suspension of new rates and continuing said 30-cent rate in effect were at the time of commencement of this suit and ever have been confiscatory of the property of this Company used, useful and required in the service of the public and deny to this Company due process of law, just compensation and the equal protection of the laws in violation of the 14th Amendment to the United States Constitution.

12. The Company further avers that on August 13, 1917, this Honorable Court having jurisdiction of all the parties and the subject matter and control over the gas supply of its Receiver, issued its decree herein mandatorily enjoining this Company from maintaining in effect said 30-cent rate and enjoining this Company from putting into force and effect any selling rate for gas except such as was or might be approved by this court, and enjoining this Company from enforcing said supply-contracts against the Receivers. Said decree is hereby referred to and made a part hereof.

13. That thereafter this court in said foreclosure suit entered an order approving a 60-cent rate for this Company and a certain division thereof between said Receivers and this Company. Said order is hereby referred to and made a part hereof.

14. That thereafter this Company filed said 60-cent rate together with copies of said decree and order with the Commission in the manner provided by the Public Service Commission Act and said rate became the legal rate by operation of said Act.

15. That the trial of said 60-cent rate from September 1, 1917, to November 15, 1918, proved to be confiscatory of the property of this Company used, useful and required in the service of the public.

16. That upon application of this Company this court, on November 15, 1918, found said 60-cent rate to be confiscatory and entered in said foreclosure suit an order granting leave to this Company to put into force and effect an 80-cent rate. Said order and opinion are hereby referred to and made a part hereof.

17. That thereafter on November 21, 1918, this Company adopted said 80-cent rate approved by this court and filed the same together with a copy of said order with said Commission and the same took effect as the legal rate by operation of the Public Service Commission Act of said state. A true and correct copy thereof is filed herewith and made a part hereof.

18. The Company avers that said 80-cent rate is reasonable and just and fair to the consumers and will not afford more than a 6 per cent. return on the property of this Company used, useful and required in the service of the public.

19. That the Company has collected large sums of money, in excess of \$....., from consumers under said 60 and 80-cent rates and the mandatory orders of this court and has paid large sums of money, in excess of \$..... to the Receivers of this court under the mandatory orders of this court; that this Company demands an accounting with said Receivers for said money so paid, and the consumers demand a refund of said rates so paid; that a refund or return of said moneys by either the Receivers or this Company would bankrupt the Receivers and this Company and confiscate their properties, wreck the business and immediately terminate the future supply of gas to consumers, and that the orderly administration of justice requires that this Honorable Court shall determine the rights of all parties in regard to said collections and disbursements so made by order of this court.

20. That the gas furnished by this Company to its consumers is reasonably worth the 80-cent selling rate now charged and was reasonably worth far in excess of the 60-cent rate.

21. That the City has filed with the Commission a complaint praying that said 60 and 80-cent rate schedules be stricken from the files and held for naught and praying the Commission to commence penal and criminal prosecutions against this Company for obeying the mandatory orders of this court; that the Commission has had a hearing thereon and on April 9, 1919, issued a certain order striking said schedules from its files and thereby purporting to reinstate said 30-cent rate and require refunding all sums collected in excess thereof, and said Commission reserved jurisdic-

tion to take certain other action in the premises; and said City is advising consumers to refuse to pay their bills, threatening to, and the Company is informed and believes it will commence or cause to be commenced numerous civil suits and criminal prosecutions for the purpose of extorting refunds from this Company notwithstanding the admitted fact that said rates and charges were at all times no more than reasonable; and the Company avers that such action and order by the Commission and the City is done and made under color of the Statutes of Missouri and is confiscatory of the property of this Company and in contravention of the 14th Amendment to the United States Constitution.

22. That this Company was by the decree of this court enjoined from appearing before the Commission or in any other court to determine its rights to compensatory rates or its rights to a supply of gas under said contracts; and that a denial of the relief herein prayed would deny this Company due process of law in contravention of the 5th Amendment; that this Company has no full, plain or adequate remedy at law and therefore files this bill in this court and suit where alone full, complete and adequate relief in equity may be had.

Wherefore, the premises considered the Company prays this Honorable Court as follows:

1. To decree the 30-cent rate fixed by ordinance 33887 of the City and by order of the Commission, confiscatory and void on and after September 1, 1917.

2. To decree sections 69, subdivision 12, and 70 of the Public Service Commission Act of Mis-

souri, authorizing suspensions of rates for eleven months without a hearing, unreasonable, confiscatory and void.

3. To decree the 60 and 80-cent selling rates of this Company in the interim from September 1, 1917, to date, reasonable, not excessive and legal.

4. To decree that said 60 and 80-cent rate schedule filed by this Company with the Commission took effect and became legal rates by operation of said Public Service Commission Act.

5. To enjoin the Commission, the City and their officers and all consumers from prosecuting any suits to enforce said 30-cent rate or any refunds heretofore collected.

6. To authorize the Receivers to negotiate and enter into new or modified contracts with this Company, and require the City and Commission to show cause, if any there be, why such contract should not be made and approved by the Commission as an item of operating costs of this Company.

7. To decree whether or not said supply-contracts have been adopted or rejected and if so find the date of such adoption or rejection.

8. To decree whether or not there were or are any legal or equitable grounds for the rejection of said contracts and adopt or reject the same accordingly.

9. To decree that the Receivers' compensation for the gas furnished to this Company in the interim from their appointment on October 9, 1912, to date and until said contracts are legally rejected or modified by agreement, is measured by said contracts.

10. To order an accounting and settlement between said Receivers and this Company.

11. To issue an alias subpoena to the Commission, the City, the Gas Company and the Receivers, requiring them to answer this bill and show cause, if any there be, why the relief herein prayed should not be granted.

12. And such other and further orders and relief as may to this Honorable Court seem equitable and just.

J. W. DANA,

Solicitor for Kansas City Gas Company.

State of Missouri, County of Jackson—ss.

J. W. Dana, being first duly sworn, deposes and says that he is counsel for Kansas City Gas Company in the above entitled cause; that he has dictated and knows the contents of the foregoing bill; that he is personally familiar with all the facts therein alleged and that the same are true except such as are made on information and belief, and as to them he believes them to be true.

.....
 Subscribed in my presence and sworn to before
 me this day of, 1919.

.....
*Notary Public within and for
 Jackson County, Missouri.*

BRIEF AND SUGGESTIONS.

Point I.

The opinion and mandate should be construed to cause no injustice and the orders spreading said mandate should be without prejudice to the rights of the distributing companies.

Under the rule in *Story v. Livingston*, 13 Peters 359, that "the mandate issued by the Supreme Court, in a case decided by the court, is to be interpreted according to the subject matter; and it is in no manner to cause injustice," it would seem that the finding of this court that "the Receivers were in no position to complain of" the "challenged orders" which prescribed selling rates for the distributing companies because "the relationship between the Receivers and the local companies" was that of vendor and vendee and not that of principal and agent and gave the Receivers no right to determine the selling rates for gas or remove them from state regulation, would require that the decrees below be reversed only in so far as they granted relief to the Receivers, and should either be affirmed by this court or continued in force by the trial court in so far as they granted affirmative relief to the local companies, for the reason that the only questions pressed upon the attention of this court were that of interstate commerce, the jurisdiction of the Commissions, and the right of the Receivers to determine the selling rates for the distributing

companies under the existing relations created by the supply contracts. The confiscatory character of said rates as to the distributing companies was not seriously questioned below; much evidence was offered on that point but was considered by the court only with reference to the rights of the Receivers; the finding of confiscation and the decree for the distributors was not assigned as error here; no record was brought up showing confiscation as to them and was not argued or briefed. Yet the decrees below enjoined all rates as confiscatory *on behalf* of the local companies. Inasmuch as these decrees were not stayed and the distributing companies were ordered by the trial court to put into effect other rates and their relation to the Receivers and consumers has been materially changed to their great prejudice and they were at all times legally entitled to reasonable rates, the cities and commissions are estopped to deny the right of the distributing companies to have said decrees affirmed or continued in force in their behalf or to reopen the case below and try the confiscatory character of said rates on their behalf as of the dates of said decrees.

The trial court seems to hold the contrary view, unless this court issues its mandate directing the affirmance of said decrees as to the distributing companies or grants leave to reopen the case in their behalf.

The decision here turned upon the right of the Receivers to maintain the suit—their interest in the selling rates. The “relation between the Receivers and the local companies” which “renders it unnecessary to discuss the effect of the rates” was

created by contracts between the original parties and continued in effect by the Receivers "without specifically adopting or *disavowing* the supply-contracts of 1904-1908. They *continued to deliver gas* to local distributing companies and to accept payments as *originally agreed*"; "the original supply-contracts have not been adopted and were *subject to rejection*." This is a clear finding that they had *not* been rejected and that the question as to whether or not legal or equitable grounds existed for their rejection was still open for adjudication below. Notwithstanding these findings by this court, which are all sustained by the record, the trial court now entertains the view that it must find "that said contracts were not binding on the Receivers" on the date of entering said decrees below and that upon the coming down of the mandate a permanent injunction must issue enjoining these companies from litigating or attempting to enforce said supply-contracts against the Receivers and that the court will be powerless to entertain any application of these companies to determine the status of said contracts or the rights, duties and liabilities of the Receivers and these companies thereunder. Such an order will be a denial of any hearing and due process of law to these companies and cause great and irreparable injury and injustice. The foreclosure suit on which this suit is dependent is still pending and the decree of sale of said Kansas Natural estate must determine the status of said contracts on a proper hearing.

Point II.

Leave to file bills of review or bills in the nature of bills of review is granted in all equity cases where justice requires and where no mischief is done to adverse parties and is the approved practice especially in rate cases.

In *Wiggins Ferry Co. v. O. & M. Railway*, 142 U. S. 396, the court said (page 413):

"When the facts of the case show the plaintiff to have an equitable title to relief, this court, while it may be unable to afford such relief upon the case made by the bill, has in several instances asserted its power to remand the case to the court below for an amendment of the pleadings and such further proceedings as may be consonant with justice."

In *Ballard v. Searls*, 130 U. S. 50, this court said (page 55):

"The only course which can be properly pursued is to remand the cause to the Circuit Court, with instructions to allow the appellant to file a supplemental bill, in the nature of a bill of review, or a bill to suspend or avoid the operation of the decree, according to the mode pointed out by Lord Redesdale in his work on Equity Pleading. He says on page 86: 'But if a case were to arise in which the new matter discovered could not be evidence of any matter in issue in the original cause, and yet clearly demonstrated error in the decree, it should seem that it might be used as ground for a bill of review, if relief could not otherwise be obtained.' And on page 95 he says:

'5. The operation of a decree signed and enrolled has been suspended in special circumstances, or avoided by matter subsequent to the decree, upon a new bill for that purpose'; and he gives an instance occurring in the time of Charles II. These views are adopted by Mr. Justice Story in his work on Equity Pleading. See Sec. 415 and note; and Sec. 428. We do not decide what precise form such a proceeding should take; the appellant will be advised by his counsel in this regard. * * *

Our decision is that the cause be remanded to the Circuit Court, with instructions to allow the appellant, defendant below, to file such supplemental bill as he may be advised, in the nature of a bill of review, or for the purpose of suspending or avoiding the decree, upon the new matter arising from the reversal of the decree in the former case * * * and that such proceedings be had thereon as justice and equity may require. And it is so ordered."

The same rule is applied in the following cases:

Willcox v. Consolidated Gas Co., 212 U. S. 19.

Northern Pacific Ry. v. North Dakota, 216 U. S. 579.

In re City of Louisville, 231 U. S. 639.

City of Louisville v. Cumberland Telephone Co., 231 U. S. 652.

Hardin v. Boyd, 113 U. S. 756.

Butler v. Eaton, 141 U. S. 240-243.

Purcell v. Miner, 4 Wall. 520.

Hill v. Phelps, 101 Fed. 650.

Hopkins v. Hebard, 194 Fed. 301.

Novelty Tufting Machine Co. v. Buser, 158 Fed. 84.

Von Faber-Castell v. Faber, 145 Fed. 626.
In re Gamewell Fire Alarm Tel. Co., 73
 Fed. 908.

In *Keith v. Alger*, 124 Fed. 32, before Justices Lurton, Severens, and Richards, the court said (Syl. 1):

"The sufficiency of the reasons alleged in support of a proffered bill of review should be determined by the appellate court, although, where material matters are involved, which have transpired in the court below since the decision of the cause, or for other sufficient reasons, the appellate court may remit the inquiry, in whole or in part, to the lower court, and authorize it to settle the matter."

In *Seymour v. White County*, 92 Fed. 115, it is said (Syl.):

"On a petition to the Circuit Court of Appeals, after a decision of that court affirming a judgment of the Circuit Court, for leave to file in the lower court a bill in the nature of a bill of review, it is deemed the better practice to grant such leave as a matter of course, unless there are special reasons to the contrary, without considering the merits of the proposed bill." Citing *Southard v. Russell*, 16 Howard 547, 570, and *Kingsbury v. Buckner*, 134 U. S. 651, 671.

In *Northern Pacific Ry. v. North Dakota*, 216 U. S. 579, the court said (page 581):

"It seems to us that the nearest approach to justice that can be made at this time is

to follow the precedent of *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

In *Hardin v. Boyd*, 113 U. S. 756, the court said (Syl. 1):

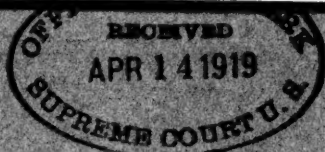
"No rule can be laid down with reference to amendments of equity pleadings that will govern all cases. They must depend upon the special circumstances of each case, and in passing upon applications to amend, the ends of justice must not be sacrificed to mere form or by too rigid an adherence to technical rules of practice."

Conclusion.

It follows from the foregoing that further proceedings in conformity with the opinion of this court require that the decrees below in favor of the distributing companies should continue in force and effect; that the decrees holding that said gas-supply-contracts were at the time of entering said decrees not binding upon the Receivers should be reversed, or that bills in the nature of bills of review should be allowed and filed below and proceedings had thereon.

Respectfully submitted,

J. W. DANA,
Solicitor for Petitioners.
910 Grand Ave.,
K. C., Mo.



IN THE
Supreme Court of the United States

Nos. 26160, 26283, 26284, 26323.

OCTOBER TERM, 1918.

No. 277.

The Public Utilities Commission for the State of Kansas
et al., *Appellants*,
vs.

John M. Landon, as Receiver of the Kansas Natural
Gas Company et al.

No. 329.

Kansas City, Missouri; the Public Service Commission
of the State of Missouri et al., *Appellants*,
vs.

John M. Landon, Receiver of the Kansas Natural
Gas Company et al.

No. 230.

Kansas City Gas Company, the Wyandotte County Gas
Company et al., *Appellants*,
vs.

Kansas Natural Gas Company, John M. Landon and
George F. Sharitt, Receivers, and Fidelity Title and
Trust Company.

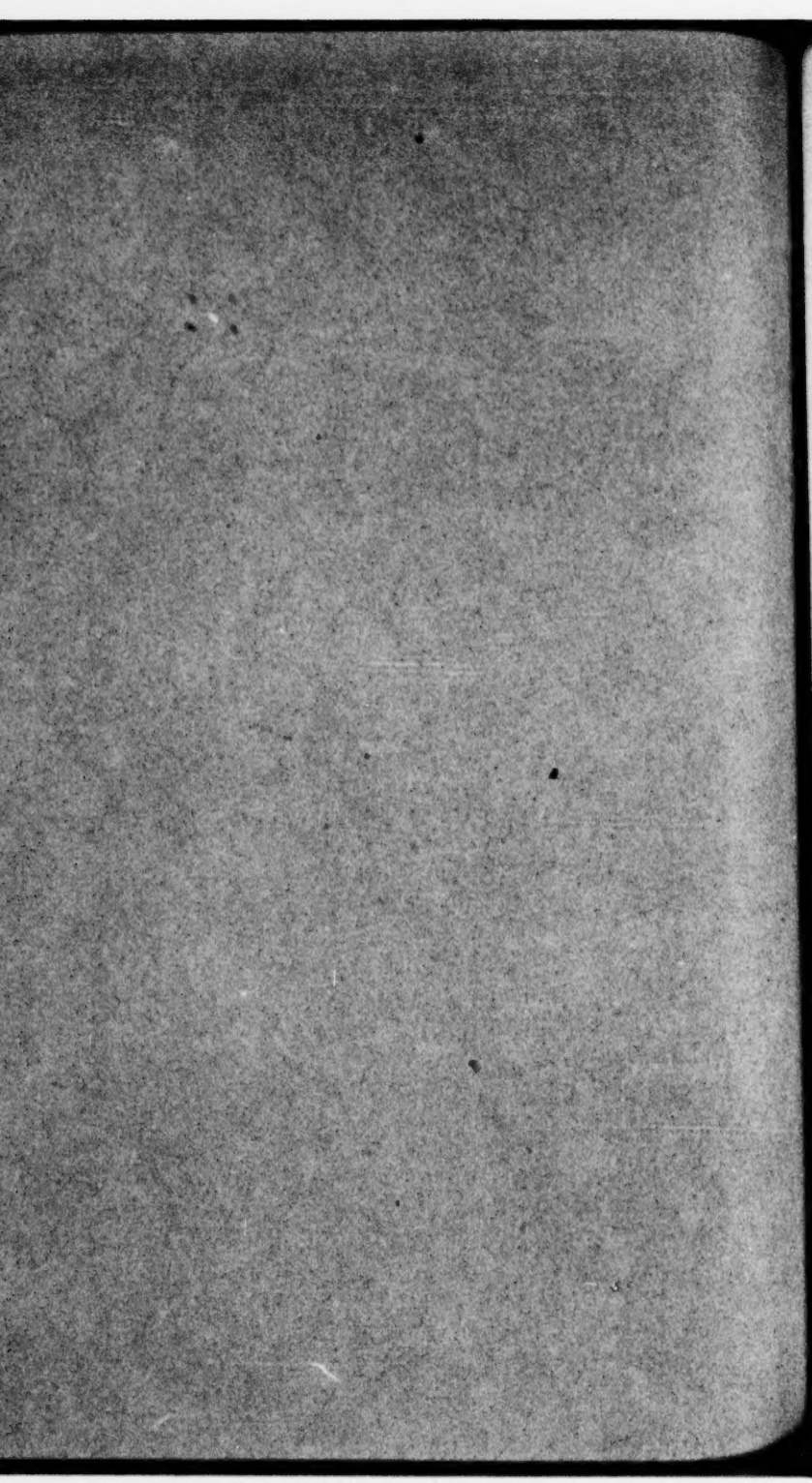
No. 353.

The Public Utilities Commission of the State of Kansas
et al., *Appellants*,
vs.

John M. Landon, as Receiver of the Kansas Natural Gas
Company et al.

APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF KANSAS.

**PETITION OF THE FIDELITY TITLE & TRUST
COMPANY FOR REHEARING.**



IN THE
Supreme Court of the United States

No. 277.

The Public Utilities Commission for the State of Kansas
et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural
Gas Company et al.

No. 329.

Kansas City, Missouri; the Public Service Commission
of the State of Missouri et al., *Appellants*,

vs.

John M. Landon, Receiver of the Kansas Natural
Gas Company et al.

No. 230.

Kansas City Gas Company, the Wyandotte County Gas
Company et al., *Appellants*,

vs.

Kansas Natural Gas Company, John M. Landon and
George F. Sharitt, Receivers, and Fidelity Title and
Trust Company.

No. 353.

The Public Utilities Commission of the State of Kansas
et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural Gas
Company et al.

**PETITION OF THE FIDELITY TITLE & TRUST
COMPANY FOR REHEARING.**

Now comes The Fidelity Title and Trust Company,
one of the appellees in the above entitled causes and
shows to the court:

Of the two receivers of the Kansas Natural Gas Company, John M. Landon is the sole managing receiver. Reference herein made to the receiver means said Landon.

Mindful of the fact that the questions here presented could be submitted to this court upon a second appeal, yet your petitioner respectfully urges a further expression by this court on the points set out below, in the interest of speedy justice and the avoidance of prolonged and multitudinous litigation.

This litigation has been in progress for nearly seven years. The Kansas Natural property is located in three states and serves approximately one million five hundred thousand people. The amount of refund claimed upon reversal is not less than \$3,000,000. Upon entry of the decrees under the mandate dissolving the injunction hundreds of suits will be instituted by consumers for refunds and not less than twenty suits will be brought by the distributing companies to test the confiscatory nature of the 28-cent rate as to them. All the questions here presented will at some time have to be determined by this court.

Owing to the uncertainty of the decrees that should be entered and of the further proceedings to be had below, the trial judge on March 28, 1919, addressed the following letter to the interested solicitors:

"My dear Sir:

Enclosed herewith is a copy of the opinion of the Supreme Court on the appeals in the Gas Case. At the suggestion of a number of attorneys inter-

ested, an informal conference will be held April 3rd, 1919, to discuss various questions which now arise, among others:

1. What 'further proceedings in conformity with this opinion' should the court take?

2. Does the Supreme Court decision furnish any basis for a claim of refund at this time from either the Receiver or the Distributing Companies?

3. Does your client anticipate filing a petition for a rehearing, and, if so, along what lines?

4. In view of the decision, what status does your client now occupy in relation to the Receiver?

5. Is there any reason why the Receiver should not now fix a schedule of rates at the city gates?

6. In view of the decision, is not the time opportune for a full and amicable adjustment of all controversies between the parties?

A frank expression of views from all parties is desired.

In case you can not be present, a communication by letter will be appreciated.

Very truly yours,

W. F. BOOTH."

Pursuant to the above letter a conference between court and counsel lasting for two days was held to discuss the effect of the opinion and decree of this Honorable Court. Some fifty solicitors were present and the views of no two litigants coincided as to what this court actually decided.

At the conclusion of the conference, the judge was unable to determine what course he should pursue. The conference failed to clarify the situation. The lower court was also uncertain as to whether the injunctions

in favor of any of the distributing companies against the 28-cent rate should stand, or whether the distributing companies could be given a hearing upon the question of the confiscatory nature of the 28-cent rate as to them as raised by their pleadings. The judge, however, expressed the view that permission must first be obtained from this court, before a hearing as to the distributing companies could be given under the mandate for "further proceedings in conformity with" the opinion of this court.

Considering the divergent views of the litigants and the uncertainty of the court as to his duties under the opinion of this court, we desire to respectfully suggest the following reasons for a rehearing before this Honorable Court.

I.

Because the Commission's order of December 10, 1915, was directed to the receiver and not to the distributing companies. This order the receiver was compelled either to obey or disobey. If he obeyed, the confiscation of the property in his control was inevitable because the rate fixed was not adequate. If he disobeyed, and he was held to be wrong, he would be subject to the severe penalties of the statute set out in paragraph 17 of the bill of complaint. This order directed to him was issued by the Kansas Commission with all of the authority of the state to compel its enforcement.

The receiver was engaged in interstate commerce, as found by this court, and he was "under no compulsion

to accept unremunerative prices." He "might sell and deliver gas so transported to local distributing companies, free from unreasonable interference by the state," but he could not take the law into his own hands and defend himself by force of arms against a police officer of Kansas, for violation of the commission's order, nor should he have incurred the risk of several millions of dollars of fines for violating this order of the commission by putting in his own rate at the gates of the city. The fact that he was engaged in interstate commerce free from state regulation and not obliged to accept unremunerative prices is just what entitled him to the injunction which he obtained against the commission. It was his duty to ask the protection of a court of equity, instead of disregarding the order and so subject himself to possible punishment by summary proceedings brought by the commission to enforce the extraordinary, exorbitant and confiscatory fines possible to be applied to him under the statutes of Kansas (Rec. p. 31).

The receiver chose the only safe course. No prudent man in charge of a great estate would risk its complete confiscation, by defying the state without the protecting arm of the court.

II.

Because in its opinion this court says "The challenged orders related directly to the price of the gas at the burner tips and only indirectly to the receiver's business," and, "The receivers were in no position to complain of them."

The rates established by the challenged orders were *joint rates* (Rec. 83 and 85). The receiver asked permission of the commission to file his own rate at the gates of the city. The commission in its opinion of July 16, 1915 (Exhibit H, attached to plaintiff's bill of complaint), says:

"On April 26, 1915, however, there was filed with the Commission a document which may be regarded as an amendment to the complaint, in which the Commission was requested to establish and make effective a schedule of rates to be collected from the Distributing Companies for natural gas delivered at the gate of each plant. This schedule of rates was constructed upon the distance plan, and varied from 13 1/3 cents per thousand cubic feet for gas delivered at Coffeyville, on the Oklahoma border, to 29 cents per thousand cubic feet for gas delivered at Atchison. As, however, this schedule was subsequently abandoned and superseded by another, no further attention need be given it."

This application was abandoned and superseded by another because the commission refused to consider any rate except a joint rate to the ultimate consumer. This position was manifestly taken by the commission in order to maintain its jurisdiction over the local distributing companies as well as the receiver. The laws of Kansas, Chapter 238, 1911, provided that any utility operating in only one city should not be under the supervision of the commission. By construing the Kansas Natural Gas business as one whole plant and the distributing companies the agents of the Kansas Natural, the commission extended its jurisdiction over the whole system. Under

this compulsion the receiver filed his schedule for joint rates.

The rate fixed by the order of December 10th, 1915, was also a joint rate. At the time this rate was fixed the cost of the gas in the field was a comparatively small item, being only six or eight cents per thousand cubic feet. The principal item of cost to consumer is the cost of transportation through the receiver's lines and the lines of the distributing companies. This is a joint service that the twenty-eight cent rate is supposed to pay for. A part of this service is interstate and the rate therefore is a direct burden upon interstate commerce.

The opinion says that the "interstate movement ended when the gas passed into the local mains." This being so it does not necessarily follow that the lower court's view that the commission was interfering with the establishment of compensatory rates was erroneous. The direct result of the enforcement of the orders of the Public Utilities Commission, would be the complete destruction of the receiver's property. His customers are limited to the few distributing companies that serve the several cities. He has no other possible use for his plant which has cost millions to install. If those patrons are taken from him his property must be junked.

What amounts to a direct burden upon interstate commerce depends upon the conditions in the case at hand. In this case the receiver is operating an expensive plant, a plant which cost millions of dollars, constructed for the express purpose of transporting gas from Oklahoma into Kansas and Missouri. He cannot supply gas

at the gates of the respective cities for 28 cents. The commission has fixed a rate of 28 cents to the ultimate consumer. His only customers therefore are absolutely unable to buy of him. The effect of the order is as direct, potent and disastrous as though it were an order prohibiting the importation of gas at the state line.

Wherefore by reason of the premises a rehearing is respectfully prayed,

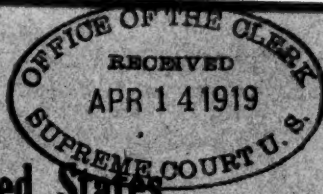
In the event of a failure of this Honorable Court to recognize the necessity for a rehearing we respectfully request that the decree of this court be so phrased as to make clear to the lower court the further proceeding which may be taken by it in conformity with the opinion.

Respectfully submitted,

CHARLES BLOOD SMITH,
Solicitor for The Fidelity Title & Trust Co.

I hereby certify that in my opinion the foregoing petition is well founded in fact and in law and not made for delay.

CHARLES BLOOD SMITH,
Solicitor for The Fidelity Title & Trust Co.



IN THE
Supreme Court of the United States

Nos. 26160, 26283, 26284, 26323.

OCTOBER TERM, 1918.

No. 277.

The Public Utilities Commission for the State of Kansas
et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural
Gas Company et al.

No. 329.

Kansas City, Missouri; The Public Service Commission
of the State of Missouri et al., *Appellants*.

vs.

John M. Landon, Receiver of The Kansas Natural Gas
Company et al.

No. 230.

Kansas City Gas Company, The Wyandotte County
Gas Company et al., *Appellants*,

vs.

Kansas Natural Gas Company, John M. Landon and
George F. Sharitt, Receivers, and Fidelity
Title and Trust Company.

No. 353.

The Public Utilities Commission of the State of Kansas
et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural Gas
Company et al.

APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES. FOR THE DISTRICT OF KANSAS.

**PETITION OF JOHN M. LANDON AND GEORGE
F. SHARRITT, RECEIVERS OF THE KANSAS
NATURAL GAS COMPANY, FOR
REHEARING.**

IN THE

Supreme Court of the United States

No. 277.

The Public Utilities Commission for the State of Kansas
et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural
Gas Company et al.

No. 329.

Kansas City, Missouri; The Public Service Commission
of the State of Missouri et al., *Appellants*.

vs.

John M. Landon, Receiver of The Kansas Natural Gas
Company et al.

No. 230.

Kansas City Gas Company, The Wyandotte County
Gas Company et al., *Appellants*,

vs.

Kansas Natural Gas Company, John M. Landon and
George F. Sharitt, Receivers, and Fidelity
Title and Trust Company.

No. 353.

The Public Utilities Commission of the State of Kansas
et al., *Appellants*,

vs.

John M. Landon, as Receiver of the Kansas Natural Gas
Company et al.

**PETITION OF JOHN M. LANDON AND GEORGE
F. SHARRITT, RECEIVERS OF THE KANSAS
NATURAL GAS COMPANY, FOR
REHEARING.**

Now come John M. Landon and George F. Sharitt,
as receivers of the Kansas Natural Gas Company, appel-
lees in the above entitled causes, and show to the court:

Of the two receivers of the Kansas Natural Gas Company, John M. Landon is the sole managing receiver. Reference herein made to the receiver means said Landon.

Mindful of the fact that the questions here presented could be submitted to this court upon a second appeal, yet your petitioners respectfully urge a further expression by this court on the points set out below, in the interest of speedy justice and the avoidance of prolonged and multitudinous litigation.

This litigation has been in progress for nearly seven years. The Kansas Natural property is located in three states and serves approximately one million five hundred thousand people. The amount of refund claimed upon reversal is not less than \$3,000,000. Upon entry of the decrees under the mandate dissolving the injunction hundreds of suits will be instituted by consumers for refunds and not less than twenty suits will be brought by the distributing companies to test the confiscatory nature of the 28-cent rate as to them. All the questions here presented will at some time have to be determined by this court.

Owing to the uncertainty of the decrees that should be entered and of the further proceedings to be had below, the trial judge on March 28, 1919, addressed the following letter to the interested solicitors:

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ested, an informal conference will be held April 3rd, 1919, to discuss various questions which now arise, among others:

1. What 'further proceedings in conformity with this opinion' should the court take?

2. Does the Supreme Court decision furnish any basis for a claim of refund at this time from either the Receiver or the Distributing Companies?

3. Does your client anticipate filing a petition for a rehearing, and, if so, along what lines?

4. In view of the decision, what status does your client now occupy in relation to the Receiver?

5. Is there any reason why the Receiver should not now fix a schedule of rates at the city gates?

6. In view of the decision, is not the time opportune for a full and amicable adjustment of all controversies between the parties?

A frank expression of views from all parties is desired.

In case you can not be present, a communication by letter will be appreciated.

Very truly yours,

W. F. BOOTH."

Pursuant to the above letter a conference between court and counsel lasting for two days was held to discuss the effect of the opinion and decree of this Honorable Court. Some fifty solicitors were present and the views of no two litigants coincided as to what this court actually decided.

At the conclusion of the conference, the judge was unable to determine what course he should pursue. The conference failed to clarify the situation. The lower court was also uncertain as to whether the injunctions in favor of any of the distributing companies against

the 28-cent rate should stand, or whether the distributing companies could be given a hearing upon the question of the confiscatory nature of the 28-cent rate as to them as raised by their pleadings. The judge, however, expressed the view that permission must first be obtained from this court, before a hearing as to the distributing companies could be given under the mandate for "further proceedings in conformity with" the opinion of this court.

While we believe no one will claim that the challenged rates were not in fact confiscatory rates, yet the conference disclosed that because of the technical reversal of the decrees it was claimed the properties involved were left without any legal rate other than such confiscatory rates and therefore refunds would be demanded for charges made since the decrees on that basis.

Considering the divergent views of the litigants and the uncertainty of the court as to his duties under the opinion of this court, we desire to respectfully suggest the following reasons for a rehearing before this Honorable Court:

I.

Because the order of December 10, 1915, was directed to the receiver and not to the distributing companies.

While couched in permissive language, it fixes maximum rates which, under the statutes of Kansas, cannot be exceeded without incurring the penalties referred to below. This statute is set out at page 20 of the record

and is found in Section 38, Chapter 238 of the Session Laws of 1911.

This order the receiver was compelled either to obey or disobey. If he obeyed, the confiscation of the property in his control was inevitable because the rate fixed was not adequate. If he disobeyed, and he was held to be wrong, he would be subject to the severe penalties of the statute set out in paragraph 17 of the bill of complaint. This order directed to him was issued by the Kansas Commission with all of the authority of the state to compel its enforcement.

The receiver was engaged in interstate commerce, as found by this court, and he was "under no compulsion to accept unremunerative prices." He "might sell and deliver gas so transported to local distributing companies, free from unreasonable interference by the state," but he could not take the law into his own hands and defend himself by force of arms against a police officer of Kansas, for violation of the Commission's order, nor should he have incurred the risk of several millions of dollars of fines for violating this order of the Commission by putting in his own rate at the gates of the city. The fact that he was engaged in interstate commerce free from state regulation and not obliged to accept unremunerative prices is just what entitled him to the injunction which he obtained against the commission. It was his duty to ask the protection of a court of equity, instead of disregarding the order and so subject himself to possible punishment by summary proceedings

brought by the commission to enforce the extraordinary, exorbitant and confiscatory fines possible to be applied to him under the statutes of Kansas (Rec. p. 31).

The receiver chose the only safe course.

For three years under that protection he has collected rates in excess of two-thirds of 28 cents. If now this court withdraws the protection granted by the lower court, it has been publicly threatened in press and in open court, that the receiver will be compelled to refund to the consumers all of the excess above his portion of the 28 cent rate. This will amount to nearly two million dollars and the confiscation sought to be averted will have been accomplished.

When the preliminary injunction was granted by the enlarged court the receiver was required to furnish a bond for \$750,000, conditioned that "in case the injunction decreed here shall be adjudged to have been improvidently issued by the final decision of that question, he will pay back to each of the consumers of the gas he furnishes herein the excess paid by such consumers therefor above what he would have paid at the rates fixed by the order of the commission of December 10, 1915." It is claimed that there will be a liability on this bond under that condition if the injunction granted by the lower court is sustained.

The Commission of Kansas still claims jurisdiction over the receiver (Brief, pp. 25, 28, 31, and Rec. pp. 186, 605, 745, 766) and in the conference reiterated the claim that it has power to fix a rate at which the

receivers shall sell gas to the distributing companies at the gates of the city.

Under these circumstances we respectfully suggest that the injunction in favor of the receiver should be sustained.

No prudent man in charge of a great estate, would risk its complete confiscation, by defying the state without the protecting arm of the court.

II.

Because in its opinion this court says "The challenged orders related directly to the price of the gas at the burner tips and only indirectly to the receiver's business," and "The receivers were in no position to complain of them."

The rates established by the challenged orders were *joint rates* (Rec. 83 and 85). The receiver asked permission of the Commission to file his own rate at the gates of the city. The Commission in its opinion of July 16, 1915 (Exhibit H, attached to plaintiff's Bill of Complaint), says:

"On April 26, 1915, however, there was filed with the Commission a document which may be regarded as an amendment to the complaint, in which the Commission was requested to establish and make effective a schedule of rates to be collected from the distributing companies for natural gas delivered at the gate of each plant. This schedule of rates was constructed upon the distance plan, and varied from 13 1/3 cents per thousand cubic feet

for gas delivered at Coffeyville, on the Oklahoma border, to 29 cents per thousand cubic feet for gas delivered at Atchison. As, however, this schedule was subsequently abandoned and superseded by another, no further attention need be given it."

This application was abandoned and superseded by another because the Commission refused to consider any rate except a joint rate to the ultimate consumer. This position was manifestly taken by the Commission in order to maintain its jurisdiction over the local distributing companies as well as the receiver. The Laws of Kansas, Chapter 238, 1911, provided that any utility operating in only one city should not be under the supervision of the Commission. By construing the Kansas Natural Gas business as one whole plant and the distributing companies the agents of the Kansas Natural, the Commission extended its jurisdiction over the whole system. Under this compulsion the receiver filed his schedule for joint rates.

The rate fixed by the order of December 10th, 1915, was also a joint rate. At the time this rate was fixed the cost of the gas in the field was a comparatively small item, being only six or eight cents per thousand cubic feet. The principal item of cost to consumer is the cost of transportation through the receiver's lines and the lines of the distributing companies. This is a joint service that the twenty-eight cent rate is supposed to pay for. A part of this service is interstate and the rate therefore is a direct burden upon interstate commerce.

The opinion says that the "interstate movement ended when the gas passed into the local mains." This being so it does not necessarily follow that the lower court's view that the Commission was interfering with the establishment of compensatory rates was erroneous. The direct result of the enforcement of the orders of the Public Utilities Commission, would be the complete destruction of the receiver's property. His customers are limited to the few distributing companies that serve the several cities. He has no other possible use for his plant which has cost millions to install. If those patrons are taken from him his property must be junked.

What amounts to a direct burden upon interstate commerce depends upon the conditions in the case at hand. In this case the receiver is operating an expensive plant, a plant which cost millions of dollars, constructed for the express purpose of transporting gas from Oklahoma into Kansas and Missouri. He cannot supply gas at the gates of the respective cities for 28 cents. The Commission has fixed a rate of 28 cents to the ultimate consumer. His only customers therefore are absolutely unable to buy of him. The effect of the order is as direct, potent and disastrous as though it were an order prohibiting the importation of gas at the state line.

Wherefore, by reason of the premises a rehearing is respectfully prayed.

In the event of a failure of this Honorable Court to recognize the necessity for a rehearing we respectfully

request that the decree of this court be so phrased as to make clear to the lower court the further proceeding which may be taken by it in conformity with the opinion.

Respectfully submitted,

JOHN H. ATWOOD,

ROBERT STONE,

CHESTER I. LONG,

*Solicitors for John M. Landon, Receiver of
Kansas Natural Gas Company.*

JOHN J. JONES,

*Solicitor for George F. Sharitt, Receiver
of Kansas Natural Gas Company.*

I hereby certify that in my opinion the foregoing petition is well founded in fact and in law and not made for delay.

JOHN H. ATWOOD,

*Solicitor for John M. Landon, Receiver of
Kansas Natural Gas Company.*



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

Nos. 277, 329, 330, 353.

277.

**THE PUBLIC UTILITIES COMMISSION FOR THE
STATE OF KANSAS ET AL., APPELLANTS,**

vs.

**JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL
GAS COMPANY, ET AL.**

329.

**KANSAS CITY, MISSOURI; THE PUBLIC SERVICE
COMMISSION OF THE STATE OF MISSOURI,
ET AL., APPELLANTS,**

vs.

**JOHN M. LANDON, RECEIVER OF THE KANSAS NATURAL
GAS COMPANY, ET AL.**

330.

**KANSAS CITY GAS COMPANY, THE WYANDOTTE
COUNTY GAS COMPANY, ET AL., APPELLANTS,**

vs.

**KANSAS NATURAL GAS COMPANY, JOHN M. LANDON
AND GEORGE F. SHARITZ, RECEIVERS, AND FIDELITY
TITLE AND TRUST COMPANY.**

353.

**THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF KANSAS ET AL., APPELLANTS,**

vs.

**JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL
GAS COMPANY, ET AL.**

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF KANSAS.**

**PETITION FOR REHEARING OR MODIFICATION OF
OPINION OF SUPREME COURT.**

**BY L. G. TRILLEAVEN, RECEIVER OF THE CON-
SUMERS LIGHT, HEAT & POWER COMPANY, OF
TOPEKA, KANSAS.**



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

Nos. 277, 329, 330, 353.

277.

THE PUBLIC UTILITIES COMMISSION FOR THE
STATE OF KANSAS ET AL., APPELLANTS,

vs.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL
GAS COMPANY, ET AL.

329.

KANSAS CITY, MISSOURI; THE PUBLIC SERVICE
COMMISSION OF THE STATE OF MISSOURI,
ET AL., APPELLANTS,

vs.

JOHN M. LANDON, RECEIVER OF THE KANSAS NATURAL
GAS COMPANY, ET AL.

330.

KANSAS CITY GAS COMPANY, THE WYANDOTTE
COUNTY GAS COMPANY, ET AL., APPELLANTS,

vs.

KANSAS NATURAL GAS COMPANY, JOHN M. LANDON
AND GEORGE F. SHARITT, RECEIVERS, AND FIDELITY
TITLE AND TRUST COMPANY.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF KANSAS ET AL., APPELLANTS,

vs.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL
GAS COMPANY, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF KANSAS.

**Petition for Rehearing or Modification of Opinion of
Supreme Court.**

**By L. G. Treleaven, Receiver of the Consumers Light, Heat
& Power Company, of Topeka, Kansas.**

L. G. Treleaven, Receiver of the Consumers Light, Heat & Power Company, of Topeka, Kansas, by Leonard S. Ferry and Thomas F. Doran, his solicitors, respectfully petitions this honorable court for a rehearing or modification of opinion in the above entitled cause, and in support of this petition shows:

1. That the record as presented and argued to this court apparently failed, unfortunately, to clearly disclose to this court the standing and rights of this petitioner in this litigation, as will be more fully shown hereafter, or this petitioner has failed to fully and clearly present to this court his issues, rights, and remedies demanded and obtained in the lower court; so that this honorable court has overlooked or misapprehended the rights of this petitioner, and in consequence has failed in its opinion to preserve and safeguard the same.

The record, however, discloses that the court below, in the exercise of proper jurisdiction, upon proper pleadings (including petitioner's amended and supplemental answer or cross-bill), sustained by competent and sufficient evidence, on July 5, 1917, made and entered its decree in behalf of this petitioner "and other defendants" (distributing companies) "seeking the same relief" (Rec., pp. 601, 604) as follows (omitting those parts of the decree not applicable to this petitioner and other distributing companies):

"The rates (twenty-five cent rate) in force on January 1, 1911, under the laws of Kansas, 1911, Chapter 238, section 30, for the sale and delivery of natural gas * * * and,

"Second, that the new rates fixed by the Public Utilities Commission of the State of Kansas by its order of December 10, 1915, known as the 'twenty-eight cent rate,' * * * were on said date and still are, non-compensatory, unreasonably low, confiscatory, and violative of the First Clause of the Fourteenth Amendment to the Constitution of the United States * * * and,

"Fourth, that the preliminary injunction heretofore granted herein was properly and providently issued; and

"Fifth, that, because the rates above specified are non-compensatory, unreasonably low, confiscatory, and violative of the first clause of the 14th Amendment to the Constitution of the United States * * * the plaintiff and the cross-complainants * * * L. G. Treleven as receiver of the Consumers Light, Heat & Power Company, The Wyandotte County Gas Company, and other defendants seeking the same relief, and each of them are entitled to have the preliminary injunction heretofore granted made permanent."

Said decree then prohibits and perpetually enjoins the Public Utilities Commission of the State of Kansas and others from enforcing the rates decreed to be unlawful and confiscatory as against this petitioner, "L. G. Treleven, as

receiver of the Consumers Light, Heat & Power Company," and other defendants "seeking the same relief."

2. Your petitioner further shows that the opinion of this court states on page 5 of the printed copy:

"Our conclusions concerning relationship between the receivers and local companies renders it unnecessary to discuss the effect of rates prescribed for the latter. The receivers were in no position to complain of them."

"The decrees below must be reversed and the cause remanded for further proceedings in conformity with this opinion."

It appears from this quotation that this court observes that the receivers of the Kansas Natural Gas Company were not in a position to complain of the rates prescribed for the local companies, but this court fails to observe that this petitioner, as receiver of a local company, *was* in a position to complain of them, *had complained* of them in this very case, and *had been protected* against them by the very decree this court has reversed.

3. The issues presented and tried in the lower court were much broader than those presented by the original bill of complaint. Answers in the nature of cross-bills, in harmony with the allegations of the complainant's bill as to the unlawful and confiscatory character of the rates, were filed by this petitioner and other defendant distributing companies seeking affirmative relief *in their own behalf*. By reason of the apparent unfortunate failure of this petitioner to clearly advise this court of this fact, the court in its opinion very naturally omitted to protect this petitioner in the rights secured and protected by the decree of the lower court, with the result that a *general reversal* was ordered without directions to the lower court as to the rights of this petitioner.

The omission of this court to consider or pass upon the rights of this petitioner and other *distributing* companies is more clearly explained by the fact that, though the plead-

ings, issues, and evidence in the court below fully justify and sustain the decree and injunction of the lower court in behalf of this petitioner and other distributing companies, the appellant Kansas Public Utilities Commission wholly failed either to embody or print in the record prepared for this court, the answer or cross-bill of this petitioner or any of his evidence, and wholly failed to make or present any assignments of error as to the decree or injunction of the lower court in favor of this petitioner and other distributing companies "seeking the same relief"; thereby wholly failing to present to this court for review or decision any of the issues between this petitioner and his co-defendant in the lower court, the Public Utilities Commission of the State of Kansas, heard and passed upon by the lower court, other than as they appear in the issues presented between complainant and the defendant, the Public Utilities Commission of the State of Kansas, and in the decree of the court below; and your petitioner shows that the issues between this petitioner and his co-defendant, the Public Utilities Commission of the State of Kansas, except as above stated, were presented to this court *only* by "Appendix A" of the brief or statement filed in this court in their own behalf by this petitioner and other distributing companies joining with him in said brief; and it is obvious that this court wholly overlooked and failed to consider said "Appendix A."

And this petitioner further shows that although the appellant, the Public Utilities Commission of the State of Kansas, duly served on counsel for this petitioner the proper prœcipe stating the portions of the record it deemed necessary on appeal as against this petitioner, and although this petitioner, through his solicitors, immediately filed his prœcipe setting out those portions of the record which *he* deemed necessary to a full and complete determination of this cause in his behalf by this court, and although the clerk of the lower court transmitted to the clerk of this court all of your petitioner's record set out in both said prœcipes, the appellant, the Public Utilities Commission of the State of Kansas,

without notice to this petitioner or his counsel, signed the stipulation for printing the record found at pages 1 and 2 of the printed record herein; that following said stipulation, which waived the provisions of section 9 of rule 10 of this court, the clerk of this court did not cause any of the record of this petitioner in the court below to be incorporated into the printed record in this court, all of which is fully shown in the affidavit of Thomas F. Doran, found at pages 4-10 of brief of your petitioner filed herein.

Your petitioner further shows that to avoid a possible *general reversal* of this cause by this court without consideration of the rights of this petitioner, he, through his counsel, prepared, printed and filed in this court, with the consent of all parties thereto (asking this court that it be treated as a part of the printed record), "Appendix A" to his brief filed herein; that said record "Appendix A" contains the amended and supplemental answer or cross-bill of this petitioner challenging the rates in question, on the ground that they were and are unlawfully established without supporting evidence, and were and are confiscatory of the property of the Consumers Light, Heat & Power Company in the hands of this petitioner as receiver. It also contains sufficient of the evidence introduced by this petitioner in the lower court to show that the challenged rates were and are unlawful and confiscatory as applied to the property of said distributing company in the hands of this petitioner as receiver. This record stands wholly uncontradicted, and fully sustains the decree and injunction of the lower court in favor of this petitioner, and that portion of said decree and injunction of the lower court in favor of this petitioner and other distributing companies "seeking the same relief" standing unchallenged and unappealed from, should have been and should be affirmed, regardless of the character of the business of the receivers of the Kansas Natural Gas Company or their relationship to the distributing companies.

If the opinion of this court stands as a *general reversal* of the decree and injunction of the lower court, without modifi-

ention, limitation or direction to the lower court as to the rights of this petitioner (and, as will be hereinafter shown, the lower court so construes this court's opinion), then this petitioner will lose all the benefits of the decree of the lower court in a matter so vital as to be totally destructive of the business and confiscatory of the property in his hands as receiver.

4. Your petitioner further respectfully shows that not only did the pleadings and evidence in the lower court establish the unlawful and confiscatory character of the statutory or twenty-five-cent rate, and the commission or twenty-eight-cent rate, as applied to his business, but it appears by the printed record in this case (pp. 1068 to 1072) that the court below, after subsequent hearing, on July 31, 1917, authorized the establishment of a *sixty-cent* rate, and provided that said rate should be divided between the receiver of the Kansas Natural Gas Company and the distributing companies, including the company in the hands of this receiver, on the basis of $57\frac{1}{2}$ per cent to the Kansas Natural Gas Company and $42\frac{1}{2}$ per cent to the distributing companies. It is a further admitted fact that the lower court, on further consideration of the needs of the distributing companies, including that in the hands of this petitioner, on November 15, 1918, authorized the installation and collection of an *eighty-cent* rate, divided on the basis of 60 per cent to this petitioner and other distributing companies, and 40 per cent to the Kansas Natural Gas Company; that under said *sixty-cent* rate, on the basis of the division fixed by the lower court, the portion of the rate which this company was required to pay to the Kansas Natural Gas Company amounted to $34\frac{1}{2}$ cents per thousand cubic feet—or more than the entire statutory rate of twenty-five cents and more than the entire commission rate of twenty-eight cents; that on the division of the subsequent eighty-cent rate fixed by the court, the portion thereof payable to the Kansas Natural Gas Company was 32 cents; that the remaining 48 cents of

the eighty-cent rate was allowed by the lower court to this petitioner and other distributing companies as the amount necessary to yield this petitioner and the other distributing companies a partial return on their investment, the rates theretofore existing having been found wholly inadequate to pay even operating expenses.

In this connection it should be remembered that the property of the Consumers Light, Heat & Power Company was placed in the hands of this petitioner, as receiver, by the very court which entered these decrees, because said Consumers Company had been impoverished and bankrupted by confiscatory rates.

Your petitioner further shows that the Public Utilities Commission of the State of Kansas and the cities of Topeka and Oakland and the consumers are construing the opinion of this honorable court as a *general reversal* of the decree of the lower court in favor of this petitioner, and are threatening your petitioner, on the coming down of the mandate of this court, with a multiplicity of suits for the recovery of the excess of the sixty and eighty-cent rates respectively over the twenty-eight-cent commission rate, and your petitioner shows that the expense of such litigation and the disastrous effects thereof and of the possible recovery of such excess would involve the estate in the hands of this receiver in irretrievable bankruptcy and prevent the possibility of the further delivery of natural gas to the cities of Topeka and Oakland.

5. Your petitioner respectfully shows that notwithstanding the fact that the decree entered in his favor in the court below was not appealed from, and hence not considered by this court, and might therefore, in this petitioner's opinion, be reasonably held to be affirmed by the opinion of this court, the court below, after an extended informal conference with counsel, since the opinion of this court was handed down, has announced that on the coming down of the mandate of this court he *must* construe the decision of this court

to mean a reversal of such decree in your petitioner's favor, saying:

"I do not think that the court should include in the decree anything in reference to the twenty-eight-cent rate being confiscatory as to the distributing companies; nor that it should enter a new injunction, or continue the old one, against the enforcement of the twenty-eight-cent rate as to the distributing companies. It seems to me that the decrees, while running as they do in favor of the receiver, and also in favor of certain of the distributing companies mentioned, and others seeking the same relief, yet were based upon the theory that each and all of the parties named were interested in the rate as a whole, being a joint rate. That theory has been disposed of adversely by the Supreme Court. The decrees, so far as they run in favor of the distributing companies, have no independent basis—no basis except their assumed relationship with the receiver giving the companies an assumed joint interest in an assumed joint rate. It seems to me that, to enter now an injunction in favor of the distributing companies touching the twenty-eight-cent rate, would be placing it upon a new basis; would be doing what the court says the lower court may not do, that is, intermeddle with the mandate and the opinion of the Supreme Court.

"Of course, not entering a decree in reference to the twenty-eight-cent rate, in favor of the distributing companies, naturally leaves the question of rebate open."

It appears from the above quotation that the lower court construes the opinion of this court, as it now stands, as wholly nullifying the former decree of the lower court in favor of this petitioner and other distributing companies seeking the same relief because the challenged rates were established and treated as "joint rates" on an assumed agency relationship between the distributing companies and the receivers of the Kansas Natural Gas Company, which relationship this court has held did not exist, and that it therefore follows that the lower court is not free, as the opinion of this

court now stands, on the coming down of the mandate (quoting from the statement of the lower court above referred to), to "include in the decree" which must be entered pursuant thereto

"anything in reference to the twenty-eight-cent rate being confiscatory as to the distributing companies; nor that it should enter a new injunction, or continue the old one, against the enforcement of the twenty-eight-cent rate as to the distributing companies * * * (as that) would be placing it upon a new basis; would be doing what the court says (*re* Sanford, 160 U. S., 255) the lower court may not do, that is, intermeddle with the mandate and the opinion of the Supreme Court."

If this construction by the lower court of the opinion of this court be correct (in which construction we cannot concur) the necessity for a modification of the opinion of this court is absolutely imperative, for the petitioner by his answer or cross-bill (Rec., Appendix "A" of petitioner's brief herein, pp. 11-36), on his own account, in the language quoted below, challenged the twenty-eight-cent rate, not only because it was confiscatory, but on the ground that it was a "joint rate" unlawfully established (Rec., Appendix "A," pp. 20-21), without evidence or hearing as to this petitioner; that the rate

"was arbitrarily fixed and established by the Public Utilities Commission for the State of Kansas against this defendant without any evidence whatever and without any consideration of its (his) rights in the premises,"

and Rec., Appendix "A," p. 21:

"That the Public Utilities Commission for the State of Kansas fixed said joint rate upon the theory and assumption that two-thirds of said rate should be paid to the Kansas Natural Gas Company or its receivers and one-third to this defendant;"

and Rec., Appendix "A," pp. 21-22:

"This defendant further shows that although said twenty-eight-cent rate is a *joint rate*, it is also a single, indivisible rate for the service rendered to the cities of Topeka and Oakland and their inhabitants; that it is legally impossible to determine a fair and equitable rate for such service without an investigation and determination of the total fair value of the property of this defendant, plus the value of the proportion of the property of the Kansas Natural Gas Company devoted to the public use of furnishing such service to the cities of Topeka and Oakland and their inhabitants."

This petitioner therefore earnestly insists that the record discloses that he sought and obtained a decree against the twenty-eight-cent rate *on his own behalf* on a basis *wholly independent* of the assumed relationship with the receivers of the pipe-line company, and that he is entitled to have the benefit and protection thereof continued. This the lower court recognizes, for in his statement, made at the informal conference hereinbefore referred to, construing the opinion of this court, he says:

"Now, that leaves the issue whether or not the twenty-eight-cent rate was confiscatory as to the distributing companies undisposed of. And it seems to me that there is a fair opportunity for the distributing companies if they see fit, or any of them, either to ask a rehearing in the Supreme Court on that matter, or to ask the court for a direction allowing the lower court to proceed and dispose of that issue. I think that would be a possible course."

This petitioner having correctly tried his case in the court below and having obtained the relief he sought *on his own behalf*, this honorable court will, we are confident, on being advised of the facts, modify its opinion and thereby preserve the rights of this petitioner without subjecting him to the burden and expense of a retrial of issues which have already been fully and fairly determined.

Your petitioner further respectfully shows that his answer or cross-bill challenged the 28-cent rate on this petitioner's own behalf, wholly independent of any contention made by the receivers of the Kansas Natural Gas Company, as is clearly shown by the following language in said answer or cross-bill (Rec., Appendix "A," p. 28):

*"This defendant charges that, although the complainant herein may not be compelled to continue the prosecution, as complainant, of the controversy set forth in the original and supplemental bills of complaint herein * * * this defendant receiver charges that he is entitled to, and will, insist upon a determination of the issues raised by this answer without reference to the continued prosecution by the Receiver of the Kansas Natural Gas Company, as complainant, of the controversy set forth in the original and supplemental bills of complaint herein; and this defendant will insist that the Receiver of Kansas Natural Gas Company reply to the issues raised by this answer or in default thereof, that a decree be entered against said receiver; and this defendant will insist that the other parties against whom this defendant prays relief in this answer and who were made parties to this litigation by the complainant in his original and supplemental bills of complaint, be likewise compelled to reply and defend hereto."*

Your petitioner further shows that the Public Utilities Commission for the State of Kansas did plead to said answer or cross-bill, and did defend as against it, as is evidenced by the fact that said Commission filed in the court below its motion to strike out of your petitioner's amended and supplemental answer and cross-bill those portions thereof on behalf of this petitioner challenging the unlawful and confiscatory character of the rates in question, as is more clearly shown by a duly certified copy of said motion attached hereto as "Exhibit A," and which your petitioner requests this court to consider as a part of the record on this petition for a rehearing as "new matter arising since the decree"; that is,

matter arising because of an apparent misunderstanding of what the record in the court below actually contained and which may, we believe, be properly considered by this court in passing upon this petition, which, for this purpose, may be treated as a bill of review; and your petitioner shows that said motion to strike out was, by the court below, after a full consideration, properly denied (see Exhibit B hereto), and the cause proceeded to trial upon the issues presented by the amended and supplemental answer and cross-bill of this petitioner, and after full consideration of the issues and evidence presented therein, the decree appealed from was entered by the lower court in behalf of this petitioner fully protecting his rights in the premises.

In consideration of this petition we ask this court to note that the able and painstaking judge who tried this case in the court below, from mature consideration of the evidence presented to him during the years this litigation has been pending before him, learned not only *that the receivers could not secure a percentage greater than two-thirds of the 28-cent rate, but that the distributing companies could not live if they received the entire 28-cent rate, which is clearly evidenced by the fact that that court authorized increases—first to 60 cents, then to 80 cents, under conditions substantially the same as those that existed when the 28-cent rate was established.*

This court should also note that both the statutory (25-cent rate) and the commission (28-cent rate) nullified and set aside the right of this petitioner to charge the much higher (45-cent) rate authorized by franchises of the cities of Topeka and Oakland (Rec., Appendix A, brief of this petitioner, p. 39 and p. 68), and also nullified the contract between the company of which this petitioner is receiver and the pipe line company which then prohibited the collection by this distributing company of any rate less than 38 cents (Rec., Appendix A, p. 56), all of which was done arbitrarily and without hearing or evidence (Rec., Appendix A, p. 20).

It therefore follows that there is neither common law, statutory, contractual, franchise nor other obligation which in any manner either impairs or invalidates the decree of the lower court in favor of this petitioner and other distributing companies named and described therein.

In consideration of the premises, your petitioner respectfully suggests that if the present opinion of this court stands unmodified, and is to be construed as the court below now construes it, the appellant Public Utilities Commission of the State of Kansas will have secured a reversal of the decree and injunctive order of the lower court in favor of this petitioner without an appeal, without a record, and without any assignment of errors lodged against such decree and injunction—a result unthinkable.

Stated in another way, if the present opinion of this court stands unmodified as a general reversal of the judgment of the lower court in favor of this petitioner, it sets aside and nullifies the decree of a court of competent jurisdiction, founded on proper pleadings, and sustained by ample evidence, enjoining a confiscatory rate unlawfully established, and this result is accomplished without an appeal, without a record, and without any assignment of errors, and without consideration of the rights of this petitioner under the Federal Constitution.

Your petitioner therefore respectfully prays that this court modify its opinion so as to affirm the decree and injunctive order of the lower court in favor of this petitioner, and in its mandate direct the lower court accordingly or grant a rehearing herein, and thereon grant the petitioner such relief as shall seem equitable and just.

LEONARD S. FERRY,
THOMAS F. DORAN,

*Solicitors for L. G. Treleven,
Receiver of the Consumers Light, Heat
& Power Company, of Topeka, Kansas.*

Certificate of Counsel.

We, the undersigned, as solicitors for petitioner, L. G. Treleaven, Receiver of the Consumers Light, Heat & Power Company, one of the appellees in the above-entitled cause, hereby certify to this honorable court that in our judgment the foregoing petition for a rehearing is well-grounded in fact and law, and that the same is not interposed for delay.

LEONARD S. FERRY,

THOMAS F. DORAN,

Solicitors for Petitioner L. G. Treleaven,

Receiver of The Consumers Light, Heat &

Power Company, of Topeka, Kansas. .

"EXHIBIT A."

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF KANSAS, FIRST
DIVISION.

In Equity. No. 136-N.

JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL
GAS COMPANY, PLAINTIFF,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF KANSAS ET AL., DEFENDANTS.

Motion to Strike Out Parts of the Amended and Supplemental Answer of L. G. Treleaven.

Come now the defendants, The Public Utilities Commission for the State of Kansas and H. O. Caster, its attorney, and move to strike out of the amended and supplemental answer of L. G. Treleaven, receiver of the Consumers Light, Heat and Power Company, the following matters, averments, and allegations, to wit:

1. The last sentence of paragraph III of said answer, for the reason that the same is incompetent, irrelevant and immaterial and does not tend to prove or disprove any of the issues in the present controversy.

2. That all, each and every part of paragraph XII be stricken out, for the aforesaid reasons.

3. That all, each and every part of paragraph XIV be stricken out, for the aforesaid reasons.

4. That all, each and every part of paragraph XVII be stricken out, for the aforesaid reasons, and for the further reason that the defendant, L. G. Treleaven, seeks, by said paragraph in connection with other parts of said amended and supplemental answer, to set up a claim for cross-relief

against these defendants, which is contrary to law and in violation of the orders of this court heretofore entered in this suit.

5. That paragraph XIX and each and every part thereof be stricken out, for the reasons aforesaid.

6. That paragraph XX and each and every part thereof be stricken out, for the reasons aforesaid.

7. That paragraph XXI and each and every part thereof be stricken out, for the reasons aforesaid.

8. That paragraph XXII and each and every part thereof be stricken out, for the reasons aforesaid.

9. That paragraph XXIII and each and every part thereof be stricken out, for the reasons aforesaid.

10. That paragraph XXIV and each and every part thereof be stricken out, for the reasons aforesaid.

11. That so much of the prayer of the defendants as asks for any decree in the nature of a cross-claim as against these defendants or for any affirmative relief as against these defendants, be stricken out of said amended and supplemental answer.

H. O. CASTER,

*Attorney for the Public Utilities
Commission for the State of Kansas.*

F. S. JACKSON,

*Special Attorney for the Public Utilities
Commission for the State of Kansas.*

Endorsed: No. 136-N. Landon, Rec., *vs.* The Public Utilities Commission of Kansas *et al.* Motion to strike from Amended Answer of Treleaven, Rec., filed Feb. 9, 1917. Morton Albaugh, Clerk.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do

hereby certify the within and foregoing to be a true, full, and correct copy of Motion to Strike from Amended Answer of Treleaven, Rec., in the suit of John M. Landon, Receiver of the Kansas Natural Gas Company *vs.* The Public Utilities Commission of the State of Kansas *et al.*, Case No. 136-N, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka in said District of Kansas, this 7th day of April, 1919.

F. L. CAMPBELL,

Clerk.

[SEAL.]

By C. B. WHITE,

Clerk.

"EXHIBIT B."

Be it remembered, that at a term of the District Court of the United States of America for the District of Kansas, begun and held at the City of Kansas City, in said District, on Monday, the 8th day of January, 1917, the following proceedings, among others, were had, and appear of record in words and figures as follows:

FRIDAY, February 9, 1917.

Before Hon. Wilbur F. Booth, Judge.

No. 136-N.

JOHN M. LANDON, RECEIVER OF THE KANSAS NATURAL
GAS COMPANY, COMPLAINANT,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF KANSAS ET AL., DEFENDANTS.

Now on this 9th day of February, 1917, come the parties hereto same as on yesterday. Thereupon comes on for

hearing the motion of the Public Utilities Commission of the State of Kansas to strike certain portions from the amended and supplemental answer of L. G. Treleven, Receiver of the Consumers Light, Heat & Power Company, and thereupon said motion was presented and argued on behalf of the Public Utilities Commission by H. O. Caster and F. S. Jackson, its solicitors, and by T. F. Doran, attorney for said receiver, and Chester I. Long, on behalf of the complainant herein. Thereupon the court having heard the arguments of counsel and being well advised in the premises finds that said motion to strike should be and the same is hereby overruled; the Public Utilities Commission of the State of Kansas through its solicitors excepting thereto; and the hour of adjournment having arrived and the hearing of said case not being concluded, the further hearing of said case is postponed until Monday morning, February 12th, at ten o'clock a. m.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within and foregoing to be a true, full, and correct copy of order overruling motion to strike out parts of the amended and supplemental answer of L. G. Treleven, Receiver, in the suit of John M. Landon, as Receiver of the Kansas Natural Gas Company, *vs.* The Public Utilities Commission of the State of Kansas *et al.*, Case No. 136-N, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka in said District of Kansas, this 10th day of April, 1919.

F. L. CAMPBELL,
Clerk,

[SEAL.]

By C. B. WHITE,
Deputy Clerk.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1918

Nos. 26160, 26283, 26284, 26323

No. 277

THE PUBLIC UTILITIES COMMISSION FOR THE STATE
OF KANSAS et al., Appellants,

v.

JOHN M. LANDON as Receiver of the Kansas Natural Gas Company et al.

No. 329

KANSAS CITY MISSOURI; THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI et al., Appellants,

v.

JOHN M. LANDON, Receiver of the Kansas Natural Gas Company et al.

No. 230

KANSAS CITY GAS COMPANY, THE WYANDOTTE COUNTY
GAS COMPANY et al., Appellants,

v.

KANSAS NATURAL GAS COMPANY, JOHN M. LANDON and
GEORGE F. SHARITT, Receivers, and FIDELITY TITLE
AND TRUST COMPANY.

No. 353

THE PUBLIC UTILITIES COMMISSION OF THE STATE
OF KANSAS et al., Appellants,

v.

JOHN M. LANDON as Receiver of the Kansas Natural Gas Company et al.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF KANSAS.

Petition of Johnson County Gas Company, Gardner Gas Company, Edgerton Gas Company, Wellsville Gas Company, Anderson County Light & Heat Company, Richmond & Princeton Gas Company, Baldwin Gas Company, Kansas Farmers Gas Company, Ottawa Gas & Electric Company, Weston Gas and Light Company and Weir Gas Company, Appellees, Distributing Companies, for Rehearing and for Leave to File Supplemental Bills in the Nature of Bills of Review, or Bills to Suspend or Avoid the Operation of the Decree as to These Parties, or to Direct the Court Below to Construe the Decree to Protect the Rights of These Parties, and Brief and Argument in Support of the Same.

To the Honorable Justices of the Supreme Court of the United States:

Now come the Johnson County Gas Company, a Kansas Corporation, the Gardner Gas Company, a Kansas Corporation, the Edgerton Gas Company, a Kansas Corporation, Wellsville Gas Company, a Kansas Corporation, Anderson County Light & Heat Company, a Kansas Corporation, the Baldwin Gas Company, a Kansas Corporation, the Kansas Farmers Gas Company, a Kansas Corporation, the Weston Gas & Light Company, a Missouri Corporation, and the Weir Gas Company, a Kansas Corporation, appellees in the above entitled causes, and show to the court:

That these appellees, are each of them distributing companies, each of them severally own and operate a gas distributing plant, wholly or principally within one city or town in the State of Kansas, except the Weston Gas Company, which owns and operates a gas distributing plant in the town of Weston, Missouri.

That under the commission laws of the State of Kansas Sec. 38, Chap. 238, Session Laws of Kansas, 1911, set out at page 20 of the record, under which law, the Public

Utilities Commission of the State of Kansas is vested with power to fix rates said Commission has no jurisdiction over public utility companies operating wholly or principally within one city or town.

That appellees, distributing companies, operated each severally, wholly within one city or town, under franchises granted by the several cities and towns which they served, in which they were located and thus not under the jurisdiction of the Kansas Commission.

That they received their gas from the Kansas Natural Gas Company and its receivers, and transported the same through their lines and delivered the same to their consumers at the burner tips. All the transactions between the Kansas Natural Gas Company and its receivers and these appellees, distributing companies, were conducted under and pursuant, and in accordance with the terms of the supply contracts shown in the record, by the terms of which these appellees, distributing companies, were to receive a portion of the gross receipts for the sale of gas.

The supreme court of Kansas (*State v. Flannelly*, 96 Kan., 372) decided that under these supply contracts the distributing companies were the agents of the Kansas Natural Gas Company and its receivers, and not vendees or purchasers of gas received from the Kansas Natural Gas Company and its receivers.

The Public Utilities Commission of Kansas did not have and did not claim to have any jurisdiction over these appellees, in the matter of fixing rates under the public utility law, because they operated wholly or principally within one city, but did assert and exercise jurisdiction over these appellees, by claiming in accordance with the decision of the Kansas supreme court that these appellees, distributing companies, were the mere agents of the Kansas Natural Gas

Company and its receivers, and therefore it, the Public Utility Commission, possessed jurisdiction over the Kansas Natural Gas Company and its agents (these distributing companies) to fix rates and did fix rates for gas below the franchise or contract rate authorized by the franchises in the cities and towns in which these appellees, distributing companies, operated.

Had it been known and decreed, as this court now holds that these appellees, and other distributing companies, were not agents of the Kansas Natural Gas Company and its receivers, but were the vendees and purchasers of the gas, then these distributing companies would have had the right to charge the franchise rate in the various cities and towns supplied by them and in case such rates were unreasonably low and confiscatory, to apply to the Public Utilities Commission for an increase in said rates, and in case of their failure to grant such rates, these appellees, distributing companies, would have had their remedy in a court of competent jurisdiction, to enjoin confiscatory rates.

Since the appointment of the receivers and in all the litigation that has followed, the power and responsibility to make rates not only for itself but for the distributing companies, has been asserted by the Kansas Natural Gas Company and its receivers and the Public Utilities Commission of Kansas has based its jurisdiction to fix rates as affecting the distributing companies, on the fact solely that the distributing companies were the mere agents of the Kansas Natural Gas Company and its receivers, and had no independent right to make their own rates or to litigate their claim. By the order of the commission fixing the rate litigated in this case, the commission ordered the Kansas Natural Gas Company and its receivers to put into effect

the rate made by the Commission and ordered the distributing companies not to charge in excess of the rate put in force by the Kansas Natural Gas Company and its receivers. Not only has the Kansas Public Utilities Commission based its jurisdiction and power to fix the rates in question on the fact that under the supply contracts the distributing companies were the agents of the Kansas Natural Gas Company and its receivers, but counsel for the Public Utilities Commission in this case from its inception and in this court, have assumed and actively asserted such to be the fact.

(See Brief of Appellant, P. U. C., p. 6) stated in the following words:

"The gas sold in Kansas is delivered to the consumer thereof in the several cities by distributing companies operating under franchises obtained by the distributing companies from the cities fixing the rates charged consumers for gas. These distributing companies act as agents for the Kansas Natural Gas Company in the distribution and sale of gas. The price received for gas is divided between the distributing companies and the receivers on a percentage basis. The gas is not sold by the receivers to the distributing companies. It is delivered from the pipe lines of the Kansas Natural Gas Company, under the control of the receivers, into pipe lines of the distributing companies, and is through these pipe lines conveyed from the pipe lines of the Kansas Natural Gas Company to the consumers."

When the present litigation was begun and the injunction issued against the Public Utilities Commission of Kansas restraining the enforcement of the rate put in effect by it, these appellees were made defendants in that suit and were enjoined from putting into effect the rate fixed by the commission, or any rate other than the rate fixed by the

Kansas Natural Gas Company and its receivers, and have remained subject to the injunction and compelled to obey its mandate from the date of its issuance to this date. Such injunction provided, among other things as follows:

"That because the rates above specified are non-compensatory, unreasonably low and confiscatory the * * * Commission * * * and *all the other parties to this suit* interested in such rates, * * * be and they are hereby, enjoined and prohibited * * * from putting or maintaining in effect * * * any of said rates * * * (Rec., 296). That the decree against the Kansas defendants permanently enjoins your petitioners from putting and maintaining in effect said rates. Sixth: That the Public Utilities Commission of the State of Kansas * * * and *all other parties to this suit* * * * are hereby permanently enjoined and prohibited from putting into force or maintaining in effect, * * * the rates prescribed by the Commission's order of December 10, 1915, or the rates in force January 1, 1911, prescribed by Sec. 30 Chapt. 238 of the Laws of Kansas, 1911, or any other rates hereafter prescribed by said Commission * * * (Rec., 603). The decree against the Missouri defendants likewise enjoins your petitioners from putting or maintaining in effect the existing rates. Seventh: * * * and the defendant distributing companies are permanently enjoined from * * * interfering with plaintiff in establishing and maintaining such rates as this court has approved or may hereafter approve for consumers of natural gas in Kansas and Missouri" (Rec., 625).

These appellees appeared and filed answer in the lower court admitting that the rates ordered by the Kansas Commission, on December 10, 1915, and the rates in force on January 1, 1911, were unreasonably low and confiscatory as to them and asked that said rates as to them be adjudged unreasonably low and confiscatory.

In the trial of this cause in the court below appellees appeared and asked permission to submit testimony in their own behalf to the effect that as to them the rate ordered by the Kansas Public Utilities Commission in question, and the rate fixed and maintained in force and effect by the franchises and ordinances of the respective cities, and by the Public Utilities Act of Kansas, were at the time of the commencement of this suit, and at the time of the trial unreasonably low and confiscatory, and denied these appellees, distributing companies, due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. This the court below refused.

These appellees, distributing companies, were denied the right of due process of law upon the mistaken theory that the Kansas Natural Gas Company and its receivers were the principal or real parties in interest and entitled to prosecute said suit below against said confiscatory rates, and that these distributing companies were the mere agents and instrumentalities of said receivers in the distribution and sale of gas to the ultimate consumers.

The Kansas Utilities Commission and its counsel, and other appellants and their counsel based their contention on the decision of the Supreme Court of the State of Kansas, and of the Kansas Utilities Commission, that these appellees, distributing companies, were the mere agents of the Kansas Natural Gas Company and persuaded the court below to so hold.

The Kansas Natural Gas Company and its receivers being the sole complainants, the Public Utilities Commission of Kansas and its counsel contended that the appellees, distributing companies, were the mere agents of the Kansas Natural Gas Company and its receivers and that the Kansas Commission possessed jurisdiction over them to fix

rates, and because of that fact persuaded the trial court below to determine that these appellees, distributing companies, were the agents of the Kansas Natural Gas Company and its receivers under said supply contracts, and therefore had no control over the litigation against rates fixed by the Kansas Public Utilities Commission and by the Kansas Natural Gas Company and its receivers, and were denied the right to try the confiscatory character of said rates as to said appellees; and were denied the right to try the issue as to whether the interest which the appellees, distributing companies, had in the gross receipts, were unreasonably low and confiscatory.

The only issue the appellees, distributing companies, were permitted to submit evidence on in the court below was whether there was any reasonable grounds for holding that the receivers could obtain more than two-thirds of the 28c rate, which was the proportion of the gross receipts to which the receiver was entitled under the supply contracts.

In the opinion (Rec., 563) rendered by the court below it said (Rec., 578): "Considerable evidence was introduced touching the financial status of the various distributing companies, the valuation of their plants, the character and extent of their business, their operating expenses and other allied matters. This evidence was introduced, not for the purpose of ascertaining with any accuracy what would be a just and fair rate to be charged by the various distributing companies, but solely for the purpose of ascertaining whether there was any reasonable grounds for holding that the Receiver could obtain more than two-thirds of the 28 cent joint rate."

In the original bill filed by the complainants in the court below it was alleged that the supply contracts were unreasonable and confiscatory as to the receivers and not bind-

ing on them. Appellees, distributing companies also sought to contest that issue in the court below but no hearing or evidence was permitted thereon, the contention being that the receivers had the right to approve or disapprove the supply contracts entered into by the Kansas Natural Gas Company, prior to the receivership, and that up to the time of the trial in the court below the receiver had not approved such supply contracts.

The final decree in the court below provided among other things:

"Nothing contained in this decree nor in the opinion on which it is based shall be construed as determining the status of the distributing companies, in Kansas or Missouri" (Rec., 604).

Thus it appears that the issue of the validity of the contracts was not tried in the court below and the decree left this issue open for adjudication by the court below on a hearing of further testimony.

By virtue of the permanent injunction upon the final hearing in the court below these appellees, distributing companies, were permanently enjoined from putting into effect the then existing rates and were compelled and ordered to put into effect the rate fixed by the receiver, and henceforth from that time to the present these appellees, distributing companies, were powerless to go to the Commission and obtain new rates and were bound by said injunction to put into effect the rates promulgated by the receiver and approved by the court below, and in conformity therewith these appellees, distributing companies, put into effect the rates promulgated and ordered by the receivers and approved by the court below, as they were legally bound to do.

An appeal was taken from the decree of the court below by the Public Utilities Commissions of Kansas and Mis-

souri and by the Attorney Generals of said states to this court.

No appeal, we believe, was taken from the decision of the court below by the cities or towns served by the appellees, distributing companies.

In the preparation of the record and submission of the cause in this court therefore, none of the pleadings or evidence submitted or attempted to be submitted by these appellees, distributing companies, in the court below was presented; and none of the issues tried or triable by these appellees, distributing companies, as between themselves and the respective cities and towns which they served, or between themselves and the Kansas Natural Gas Company and its receivers, either affecting the unreasonable or confiscatory character of the rate or the validity of the supply contracts, nor any of the issues between the distributing companies and the Public Utilities Commission of Kansas on the question of the confiscatory character of the rate, affecting such appellees, distributing companies, was submitted to this court on appeal.

It results from these facts that by reason of the contention of the Public Utilities Commission of Kansas, and the decision of the Supreme Court of Kansas that these appellees, distributing companies, were under the supply contracts, the mere agents of the Kansas Natural Gas Company and its receivers, and the decision of the court below affirming such contention, that these appellees, distributing companies, have never had an opportunity to apply for or secure rates in their own behalf before the Public Utilities Commissions of Kansas and Missouri and have never had an opportunity since this litigation was commenced to try the issues as to whether the rates in force as to them were unreasonably low and confiscatory, or whether the franchise

rates in the respective cities and towns in which they operated were unreasonably low and confiscatory, and whether the interest which these appellees, distributing companies, had in the gross receipts from the sale of gas under the supply contracts, was unreasonably low and confiscatory.

Notwithstanding these facts since the rendition of the opinion by this Honorable Court, reversing the decree of the lower court, and in effect dissolving the injunction granted by the lower court in favor of the Kansas Natural Gas Company and its receivers, these appellees, distributing companies, are threatened with demands for a rebate of money collected by them pursuant to and in conformity with the injunction issued by the lower court against them under which they were compelled to transact their business. Such rebate, if collected would surely bankrupt all of the appellees and leave the cities and towns they serve without gas service.

Appellees distributing companies further show the court that by reason of the opinion of this court in this case, great diversity of opinion arose between counsel for the respective parties with respect to the scope, meaning and effect of such opinion and its effect on the rights of the many parties interested in the litigation.

That thereupon upon an invitation of the court below a conference was held pursuant to a letter sent out as follows:

"My Dear Sir:

Enclosed herewith is a copy of the opinion of the Supreme Court on the appeals in the Gas Case. At the suggestion of a number of attorneys interested, an informal conference will be held April 3rd, 1919, to discuss various questions which now arise among others:

1. What further proceedings in conformity with this opinion should the court take?

2. Does the Supreme Court decision furnish any basis for a claim of refund at this time from either the Receiver or the Distributing Companies?

3. Does your client anticipate filing a petition for rehearing and if so along what lines?

4. In view of the decision, what status does your client now occupy in relation to the Receiver?

5. Is there any reason why the Receiver should not now fix a schedule of rates at the city gates?

6. In view of the decision, is not the time opportune for a full and amicable adjustment of all controversies between the parties?

A frank expression of views from all parties is desired.

In case you can not be present, a communication by letter will be appreciated.

Very truly yours,

W. F. BOOTH."

That at said conference approximately fifty solicitors were present. Practically all of them maintaining widely divergent opinions with respect to the scope, meaning and effect of said opinion.

Your petitioners further state that at said conference between the court below and counsel, the court expressed the view that upon the coming down of the mandate, the court below would, in conformity with the opinion of this court enter a final order holding and decreeing that the supply contracts existing between the Kansas Natural Gas Company and your petitioners were not binding upon the receivers at the time of the entering of the decree appealed from, and would issue a permanent injunction against your petitioners attempting to enforce said supply contracts against the Receivers or the trust estate and that the court would be powerless to entertain any application by your petitioners or accept any proofs to show whether or not said

contracts had been adopted by the Receivers by implication and by their course of business or whether or not there were legal or equitable grounds for the disavowal and rejection of said contracts at the time of entering of said decree, or at the present time.

Your petitioners respectfully show that they have ample evidence and can prove that such supply contracts were fair, reasonable and just and that said appellees constructed their plants and made large investments installing and operating their plants in order to furnish a market for the gas supply of the Kansas Natural Gas Company in reliance upon said supply contracts, and that to cancel said contracts without permitting the appellees to have an opportunity of having such issues fairly tried and determined in a court of competent jurisdiction, would be denying to appellees, distributing companies, due process of law, and would result in irreparable loss and injustice to them.

Your petitioners further respectfully show to the court that if given an opportunity to try said issues before a court of competent jurisdiction they have ample evidence to prove that as to them the rates which were effective and which were enjoined and suspended by the decree of the lower court were unreasonably low and confiscatory and denied to these appellees the rights conferred on them by the Fourteenth Amendment to the Constitution of the United States, and that they have ample evidence and will be able to show that the proportion of the rates then in force and enjoined by the injunction which they received, being one-third of the gross receipts thereof under said supply contracts was as to them unreasonably low and confiscatory and denied to them the rights conferred on them by the Fourteenth Amendment to the Constitution of the United States.

Your petitioners further respectfully show to the Court that they have ample evidence and will be able to prove

in any court of competent jurisdiction that the rates that were put into effect under and pursuant to the injunction issued by the lower court under the orders and directions of the receivers of the Kansas Natural Gas Company, were fair, reasonable and just and that if appellees are required to refund any portion thereof, their property will be confiscated and they will be denied the equal protection of the law and due process of law, to which they are entitled under the Constitution of the United States.

Wherefore, the premises considered your petitioners pray this Honorable Court:

1. To grant a rehearing in this cause.

2. To issue its mandate to the court below specifically directing said court to continue in force and effect as to these appellees, distributing companies, those parts of its decree ordering and commanding appellees to put into force and effect the rates fixed by the receivers of the Kansas Natural Gas Company and approved by the court below, and prohibiting appellees from putting in effect during the continuance of such injunction any other or different rate or rates than those ordered put into effect by the receiver of the Kansas Natural Gas Company and approved by the court below, and specifically directing said court below to reverse that part of its decree holding that said supply contracts were not binding on the receivers, and specifically directing the court below to permit appellees to submit in said court in said cause, pleadings and proof on the issue of whether the rates put in force by the Kansas Public Utilities Commission which were enjoined in this cause were as to appellees unreasonably low and confiscatory, and the issue of whether the percentage of the gross receipts under said rates, collectible by appellees under said supply contracts were unreasonably low and confiscatory.

3. Or in lieu thereof that this court grant leave to your petitioners, these appellees, to file in the court below bills or supplemental bills in the nature of bills of review to suspend and avoid the operation of the decree of this court as to these appellees together with the right to offer testimony in the court below in support of the same. Said bills or supplemental bills in the nature of bills of review to present to the court below issues stated above as to whether the rates put into effect by the Kansas Utilities Commission and which were enjoined in this cause by the lower court were as to these petitioners and appellees unreasonably low and confiscatory, and whether the rates put into effect by the receivers of the Kansas Natural Gas Company under and pursuant to the injunction issued by the court below was as to these appellees unreasonably low and confiscatory, and whether the percentage of the gross receipts received by these appellees under said supply contracts was unreasonably low and confiscatory, and also the issue as to whether the said supply contracts were valid and binding on the receiver of the Kansas Natural Gas Company and specifically direct and authorize the court below on said pleadings or other proper pleadings and proof to hear, try and determine said issues.

CHAS. A. LOOMIS,

Solicitor for Petitioners and Appellees.

State of Missouri, County of Jackson, ss.

I hereby affirm that in my opinion the foregoing petition is well founded in fact, and in law and is not made for delay.

CHAS. A. LOOMIS,

Solicitor for Petitioners and Appellees.





SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

Nos. 277, 328, 330, 353.

277.

**THE PUBLIC UTILITIES COMMISSION FOR THE
STATE OF KANSAS ET AL., APPELLANTS,**

vs.

**JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL
GAS COMPANY, ET AL.**

328.

**KANSAS CITY, MISSOURI, THE PUBLIC SERVICE
COMMISSION OF THE STATE OF MISSOURI,
ET AL., APPELLANTS,**

vs.

**JOHN M. LANDON, RECEIVER OF THE KANSAS NATURAL
GAS COMPANY, ET AL.**

330.

**KANSAS CITY GAS COMPANY, THE WYANDOTTE
COUNTY GAS COMPANY, ET AL., APPELLANTS,**

vs.

**KANSAS NATURAL GAS COMPANY, JOHN M. LANDON
AND GEORGE F. SHARITT, RECEIVERS, AND FIDELITY
TITLE AND TRUST COMPANY.**

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STATE OF KANSAS ET AL., APPELLANTS,**

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GAS COMPANY, ET AL.**

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF KANSAS,**

**PETITION FOR MODIFICATION OF OPINION OF
SUPREME COURT, OR FOR REHEARING, BY THE
LEAVENWORTH LIGHT, HEAT AND POWER COM-
PANY, OF LEAVENWORTH, KANSAS.**

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
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**PETITION FOR MODIFICATION OF OPINION OF
SUPREME COURT, OR FOR REHEARING, BY THE
LEAVENWORTH LIGHT, HEAT AND POWER COM-
PANY, OF LEAVENWORTH, KANSAS.**

If the Court please:

Now comes the Leavenworth Light, Heat and Power Company, of Leavenworth, Kansas, by Floyd E. Harper, its solicitor, and respectfully asks this honorable court for a modification of its opinion, or for rehearing in the above-entitled cause.

We have carefully examined the opinion filed herein, and we believe that the rights and interests of this petitioner imperatively require the filing of this petition, to the end that full determination of the issues affecting the property of this petitioner be adjudicated.

We respectfully submit that it is apparent from the opinion filed herein, announced by this honorable court under date of March 17, 1919, that certain issues, rights and remedies vital to the interests of this petitioner are not determined. Possibly we have been unfortunate in not fairly

and fully presenting to this court the interests of this petitioner as affected by the decree of the district court. However, a reference to the brief filed on behalf of this petitioner in this court jointly with the Topeka and Atchison companies, will disclose that a sincere effort was made to present these matters (the facts as to the Topeka company being typical of those covering this company and the Atchison company), and this petitioner refers to the petition for rehearing filed by the receiver of the Topeka company for a full and detailed statement of the facts upon which the decree of the lower court in favor of the distributing company is founded. We believe that in the opinion filed it is evident that certain material elements, issues and important rights involved in this cause and of vital concern to this petitioner have been misapprehended and overlooked.

It is possible we do not correctly construe the language of the opinion filed herein. We note the statement of the ultimate conclusion of the opinion in the following language:

"Our conclusion concerning relationship between the receivers and local companies renders it unnecessary to discuss the effect of rates prescribed for the latter. The receivers were in no position to complain of them."

This language, as applied to the original bill, is, of course, entirely clear.

However, we respectfully submit that, if it is to be construed as in any way affecting the provisions of the decree of the district court on the cross-bills, it places this petitioner in a most embarrassing and unfortunate position.

In view of the fact that the Public Utilities Commission for the State of Kansas is claiming that the effect of the opinion filed by this court is to be construed as a complete reversal of the relief granted by the district court under the cross-bills, as well as that granted under the original bill, the disastrous consequences which would follow to the property

of this petitioner becomes obvious, if the claims of the Utilities Commission be sustained in that regard.

We respectfully submit that the opinion filed overlooks the fact that the decree of the district court was much broader than the issues framed upon the original bill filed by the receiver of the pipe-line company.

The suit in the district court was begun by the filing of the original bill by the receiver of the Kansas Natural Gas Company; it is clear from the opinion that the decree rendered by the district court upon the issues of the original bill is reversed.

However, in addition to the decree upon the original bill, the district court also in its decree granted certain relief of most vital importance upon the cross-bills filed in this proceeding.

We are contending that the opinion filed by this court in no manner reverses the findings of the decree of the district court upon the cross-bills in this cause. If that be true, and the claims of the Kansas Public Utilities Commission in that respect be unfounded, we respectfully pray that this court modify the opinion filed, by declaring in clear and unmistakable language, that conclusion.

However, if the construction sought to be placed upon the opinion by the Kansas Public Utilities Commission be correct, then we respectfully submit that the following observations are in point and appropriate, as calling to the attention of this court certain misapprehensions of the condition of the record in this case and the various issues arising thereon and presented thereby.

The following suggestions are, therefore, submitted, in view of the present claims of the Kansas Public Utilities Commission, appellant, as to the effect of the order of this court as set forth in the opinion on file:

1. Independent of whether or not the interstate character of the transportation and delivery of natural gas ceases at the connection between the pipe-line company and the city mains, yet the effect of the 28-cent order of the Kansas Com-

mission directly affects the interstate commerce conducted by the pipe-line company.

2. The order of the Public Utilities Commission of the State of Kansas, entered pursuant to the statute of that State, attempted to establish a *joint rate*, to be divided between the pipe-line company and the local distributing company, to be paid by the consumer for gas delivered to his meter.

3. The transaction involved in producing the gas in the Oklahoma field, transporting the same interstate and delivering the product to the consumer in Leavenworth has been uniformly treated, accepted and adjudicated, both by the operators of the properties and by the Kansas Utilities Commission, as a joint operation and a single transportation movement.

4. The flow of gas from the mains of the pipe-line company into the mains of the local distributing company is not measured until delivered to the ultimate consumer and measured through the meter on his premises.

5. The rate fixed by the Public Utilities Commission of the State of Kansas, and enjoined by the decree of the district court appealed from, was a rate ordered paid by the consumer upon the assumed division thereof between the pipe-line company and the local distributing company.

6. The rate of 28 cents per thousand cubic feet prescribed in the order of the Public Utilities Commission as the rate to be paid by the consumer, is less than the fair and reasonable compensation to be paid to the Kansas Natural Gas Company (the pipe-line company) for its product and service, independent of the fair compensation to the local distributing company. (See petition of Treleaven, receiver of the Topeka company, for a rehearing herein, pp. 7-8.

7. The Kansas Natural Gas Company is immediately and directly interested in the confiscatory character of the rate of 28 cents per thousand cubic feet of gas prescribed by the Kansas Public Utilities Commission, the same being less than the fair compensation to the pipe-line company alone for its

service in producing and transporting the gas to the mains of the local distributing company.

8. If the enforcement of the order of the Kansas Utilities Commission prescribing the 28-cent gas rate is not restrained by injunction, then this will limit the rate to be collected by the distributing company; the distributing company could not pay the pipe-line company more for the gas than can be collected from the consumers. Therefore the 28-cent rate order of the Commission is a direct burden upon the interstate commerce of the pipe-line company, because its enforcement would entirely destroy that commerce.

9. No errors were assigned on the record in this case against the findings and decree of the district court upon the cross-bills of the distributing companies. Therefore the opinion of this court should formally affirm the decree on the cross-bill, or should clarify the issues between the parties to the record as to the effect of the order of reversal upon the decree of the district court entered on the cross-bills.

10. The distributing companies were necessary and proper parties in this case for a full and complete determination of all the issues arising upon the record. There being no assignments of error against the decree in favor of the distributing companies, as complainants in their cross-bills, the opinion of this court should be limited in specific language to the issues raised by the original bill, and should specifically affirm the decree in favor of the distributing companies.

FLOYD E. HARPER,

*Solicitor for the Leavenworth Light, Heat,
and Power Company of Leavenworth, Kansas.*

THOMAS F. DORAN,

Of Counsel.

Certificate.

STATE OF KANSAS,

Leavenworth County, ss:

I hereby certify that in my opinion the foregoing petition is well founded in fact and in law, and not made for delay.

FLOYD E. HARPER,

*Solicitor for the Leavenworth Light, Heat,
and Power Company of Leavenworth, Kansas.*



**In the Supreme Court
of the United States**

OCTOBER TERM, 1918.



No. 277

**THE PUBLIC UTILITIES COMMISSION FOR THE STATE OF
KANSAS. et al., Appellants.**

vs.

**JOHN M. LANDON AS RECEIVER OF THE KANSAS NATURAL
GAS COMPANY. et al.**

No. 329

**KANSAS CITY, MISSOURI; THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI et al. Appellants.**

vs.

**JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL
GAS COMPANY. et al.**

No. 330

**KANSAS CITY GAS COMPANY, THE WYANDOTTE COUNTY
GAS COMPANY. et al. Appellants.**

vs.

**KANSAS NATURAL GAS COMPANY, JOHN M. LANDON, and
GEORGE F. SHARRITT, RECEIVERS, and FIDELITY TITLE
AND TRUST COMPANY.**

No. 353

**THE PUBLIC UTILITIES COMMISSION OF THE STATE OF
KANSAS. et al. Appellants.**

vs.

**JOHN M. LANDON, AS RECEIVER OF THE KANSAS NATURAL
GAS COMPANY. et al.**

**Motion of the Atchison Railway, Light and Power
Company, Appellee, to modify the opinion and decree
of this court by declaring that the decree of the court
below enjoining the twenty-eight cent rate as applicable
to the distributing companies has not been reversed, or
permit and direct the court below to try the validity of
the order of The Kansas Public Utilities Commission
as it affects the distributing companies, and the other
issues in the cause not disposed of by the opinion of
this court, or to grant a re-hearing herein.**

J. M. CHALLISS,

**Attorney and Solicitor for The Atchison
Railway, Light & Power Company.**

**W. P. WAGGENER,
Of Counsel.**

Appellee.

**401 Commercial Street,
Atchison, Kansas.**

**401 Commercial Street,
Atchison, Kansas.**

In the Supreme Court of the United States.

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No. 277

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Motion of the Atchison Railway, Light and Power Company, Appellee, to modify the opinion and decree of this court by declaring that the decree of the court below enjoining the twenty-eight cent rate as applicable to the distributing companies has not been reversed, or permit and direct the court below to try the validity of the order of The Kansas Public Utilities Commission as it affects the distributing companies, and the other issues in the cause not disposed of by the opinion of this court, or to grant a re-hearing herein.

Comes now The Atchison Railway, Light & Power Company, one of the appellees herein, and states that it is one of the distributing companies, engaged jointly with the receiver of The Kansas Natural Gas Company in the distribution and sale of gas in the city of Atchison, Kansas; that in litigation in the court below, it, together with the City of Atchison, and other distributing companies and cities, were parties; that when The Kansas Public Utilities Commission made its order, fixing the joint rate of twenty-eight cents for gas to be furnished by the receiver of The Kansas Natural Gas Company and the distributing companies, the said Receiver, being the producer, and being directly and vitally interested in such order, brought his action against the Public Utilities Commission of the state of Kansas and the various distributing companies and cities, for the purpose of testing the validity of such twenty-eight cent order, and enjoining its enforcement under the provisions of the statute of the State of Kansas, which provides for such a remedy.

A cross bill was filed by The Atchison Railway, Light & Power Company and other distributing companies, and upon such cross bill The Atchison Railway, Light & Power Company introduced evidence of the confiscatory character of such twenty-eight cent rate order, evidence of the valuation of its plant, used and useful in the public service, the cost of operation, and gross and net returns. A decree of the lower court was entered, finding that such twenty-eight cent rate order, was unreasonably low and confiscatory, and its enforcement was enjoined, and a joint rate of sixty cents was established by decree of the court, which the distributing companies were authorized to exact and receive from the public, and a certain portion thereof was to be returned to the receiver, and the remainder retained by the distributing companies.

The distributing companies were proper and necessary parties to the litigation. The jurisdiction of the court below was questioned, inquired into, and sustained, and upon appeal,

has been affirmed by the decree of this court. The effect of the decree of the court below was that the distributing company was prevented from charging any other or different rate for gas than that which would produce the receiver the amount of return he was found to be entitled to receive under the sixty cent order of the court. An appeal was taken from this decree by the Kansas Public Utilities Commission, but no exception was taken to that portion of the decree which found and held that the twenty-eight cent rate order was confiscatory of the property and business of the distributing companies.

In view of that fact, and in view of the further fact that the opinion of this court does not touch upon the question as to the effect of this twenty-eight cent rate upon the property of the distributing companies, much doubt and speculation has arisen in the minds of counsel representing the various parties as to the exact meaning of the opinion of this court, and as to what effect it will have upon the portions of the decree of the lower court which were not the subject of review in the appeal, and have not been touched upon in the opinion.

The decree as to this appellee found that the twenty-eight cent rate was confiscatory generally, and then permanently enjoined this twenty-eight cent rate as to the distributing companies, as well as to the receiver. (Vide par. "2" and "5" Records, page 602).

There were no assignments of error lodged against this portion of the decree. There is included in the transcript, no evidence on this subject, and no discussion of the matter in appellant's brief. Under these circumstances, we respectfully submit this court should not direct a dissolution of the injunction in favor of the distributing companies when the question has not been brought upon the record, nor submitted to the court, and yet a general reversal with directions to proceed in accordance with the opinion, if construed as contended for by the Commission, will result in a reversal of all that has been done in the past, which alone has protected the property of these distributing companies from confiscation.

True it is, that Judge Booth in his opinion generally states that considerable evidence of valuation and cost of operation of the distributing plants was received, for the purpose of determining whether the receiver could secure any greater proportion of the twenty-eight cent rate. The distributing companies had their cross bills and were challenging the validity of the twenty-eight cent rate as to them. The matter went before the court on proper pleading. Evidence was tendered; injunction was granted. The matter has thus been heard and determined, and stands unreversed, on account of no appeal having been taken therefrom, this is the situation or the distributing companies have not had their day in court.

It was intimated by the court below in informal conference that it is its duty to set aside injunction in toto under the mandate and the opinion. Even so, the parties are still in court. The court has jurisdiction over them, and the subject-matter, and if all that has been done is to be undone, there should be affirmative direction to the court below to proceed, after a re-framing of the issues, if necessary, to hear, try and determine the effect of the twenty-eight cent rate order upon the distributing companies, their property and business.

Under the present arrangement, the distributing companies are the sole market for the receiver of The Kansas Natural Gas Company, and if the effect of the twenty-eight cent rate is to bankrupt the distributing companies and confiscate their property, it thus becomes a direct, tangible and disastrous burden upon the Interstate Commerce in which the Receiver is engaged.

The court in its opinion has held that the receiver is not interested in the rates which are to be received by the distributing companies, as he cannot be compelled to receive an unremunerative rate. But as a practical question, we respectfully submit that the Receiver is vitally interested in seeing that the distributing companies secure from the public a rate not only

sufficiently remunerative to justify them in continuing business, but also sufficiently remunerative to enable him to carry on the Interstate Commerce in which he is engaged. A commission-made rate which will destroy the receiver's market, will absolutely destroy the receiver's business.

We respectfully submit that the opinion filed herein by this court overlooks the fact that the decree of the court below was more comprehensive than the issues framed upon the original bill filed by the Receiver of The Kansas Natural Gas Company, but included the entire business as a whole, and granted relief upon cross bills which were filed by the distributing companies, and afforded relief of vital importance to them.

We respectfully submit that the opinion filed by this court does not reverse the finding and decree of the lower court upon these cross bills. If that is a fact, then the claims of the Kansas Public Utilities Commission in that respect are without merit, and an indication by this court in a modification of its opinion or decree to that effect will preserve to these distributing companies that which a judicial determination has ascertained to be their due, and will tend to shorten litigation which has been much protracted.

If, however, the construction of the opinion which is contended for by the Kansas Public Utilities Commission be correct, then we respectfully submit that the following observations are in point and appropriate, after calling to the attention of this court certain misapprehensions of the condition of the record in this case, and the various issues arising therefrom and presented thereby:

1st: The twenty-eight cent rate order of the Kansas Public Utilities Commission directly affects and controls the Interstate Commerce conducted by the receiver of The Kansas Natural Gas Company, irrespective of whether or not the interstate character of his business ceases at the city gates or the burner tips. The Receiver cannot secure for his product more than the distributor can receive from the public, and a rate

order which applies to the local distributor only will directly affect interstate commerce, if the rate order will not permit the distributor to secure the product.

2nd: The order of the Kansas Public Utilities Commission, which was enjoined in the lower court, attempted to establish a *joint* rate to be divided between the producer and the distributor, and which was to be paid and collected from the consumer for gas passing through his meter. The injunction as to the receiver's portion of this rate has been dissolved. The injunction in favor of the distributing companies' portion of this rate stands, or is dissolved, as this court is now asked to determine. The attitude of the Kansas Utilities Commission, the receiver of The Kansas Natural Gas Company, and the distributing companies has always been that the production of gas in Oklahoma and its distribution in Kansas and Missouri was a joint operation, and one continuous transporting movement from the gas well to the burner tip. The gas which leaves the well in Oklahoma is never measured, so far as the public is concerned, until delivered to the ultimate consumer and measured through his meter.

3rd: The rate fixed by the Public Utilities Commission of the State of Kansas and enjoined by decree of the court below, and appealed from, was a gross joint rate ordered paid by the consumer for the joint benefit of the receiver of the Kansas Natural Gas Company and the distributing companies. In this gross joint rate, the receiver was vitally interested, as well as the distributing companies.

4th. Irrespective of the findings of the lower court as to the interstate or intrastate character of the business conducted by the receiver and distributing companies, it is apparent from the record in this case and the evidence and the decree of the court below, that the rate of twenty-eight cents per thousand cubic feet prescribed in the order of the Public Utilities Commission to be paid by the ultimate consumer, is less than the fair and reasonable compensation to be paid to the receiver of

The Kansas Natural Gas Company, the carrier, for its product and service, outside of and beyond the fair compensation to which the local distributing company is entitled.

5th: The Kansas Natural Gas Company or its receiver, which this court has held is engaged in interstate commerce, is immediately and directly interested in the confiscatory character of the twenty-eight cent rate, made by The Kansas Public Utilities Commission, the same being less than the fair compensation of the pipe line company alone for the service it performs in producing and transporting the gas from Oklahoma across the State of Kansas and to the distributing companies.

6th: If the enforcement of the order of the Kansas Public Utilities Commission, prescribing the twenty-eight cent gas rate and which has been enjoined by the lower court, is not restrained by an affirmation of that portion of the decree of the lower court, or by new and additional restraining orders to be issued by the lower court, upon permission and direction by this court, then such twenty-eight cent rate will be in force and effect. The result will be that the distributing company cannot pay The Kansas Natural Gas Company more for the gas than can be secured from the consumer. Therefore, the twenty-eight cent rate order, even though it may be held to be binding only upon the local company, will become a direct burden upon and in fact a prohibition of the Interstate commerce of the carrier company, because the enforcement of such rate order would annihilate and destroy the market of the carrier, and he will be without customers or consumers.

7th: No errors were assigned on the record in this case against the findings and decree of the lower court upon the cross bill of your petitioner, therefore the opinion of this court should formally affirm the decree upon the cross bill in this petitioner's favor, or if it should be held that such decree should be reversed, direction and permission should go to the lower court to take up the issues joined between this local distributing company, the Utilities Commission and the Receiver,

and determine the rights, liabilities and obligations of the parties in the premises.

8th: In view of the intimate relations existing between the pipe line company and the distributing company, their method of conducting the business, the joint rate which was provided in the original distribution contracts, the joint rate which was maintained in that respect by the order of the Public Utilities Commission, and the joint rate which was recognized and covered by the decree of the lower court, and in further view of the fact that the business of the pipe line company or its receiver, and the distributing companies was carried on so far as the public is concerned as a unit, and in further view of the fact that without the distributing companies, the receiver of the pipe line company would have no market for his product, this petitioner, as well as other distributing companies similarly situated, was an indispensably necessary and proper party to the proceedings in the court below for a full and complete determination of all the issues arising upon the record, and particularly upon its cross bill.

This applicant secured a decree of the lower court in its favor and in favor of distributing companies similarly situated upon its cross bill. No assignment of error having been lodged against the decree in that respect, such decree should be affirmatively up-held by the opinion and decree of this court, to the end that the property and estate of this applicant can be protected, as in its cross bill prayed.

In the proceeding in this court this applicant did not suggest the incorporation in the record of its cross bill and the evidence it produced, nor the incorporation of evidence produced by other distributing companies similarly situated, for that from the state of the record, no appeal was attempted to be had against that portion of the decree in which this applicant was vitally interested. With the decree as it stood, it had no complaint to make, excepting as to the insufficiency of the sixty cent rate order by the lower court, which was a matter

of detail and which was subsequently corrected by application to the court, and a more compensatory rate of eighty cents was made.

In consideration of all which this applicant respectfully prays the court that it modify its opinion and the decree of this court, by affirmatively holding and stating the decree of the court below, enjoining the enforcement of the twenty-eight cent rate as against the distributing companies is affirmed, or in the event the court concludes that such would be improper, then that the lower court be permitted and directed to have the issues between the parties reframed, if necessary, and that a full hearing be had upon the original, amended or supplemental cross bills of the distributing companies, as to the confiscatory character of the twenty-eight cent rate order of the Kansas Public Utilities Commission, or that a rehearing be granted herein, and if it should be suggested that the printed record is incomplete or deficient in any respect, to enable the court to pass upon the matters suggested, then that permission be granted to supplement and perfect such record prior to such re-hearing, all of which is respectfully suggested and submitted to the end that the property, business and estate of this applicant shall not be destroyed and confiscated by the enforcement of the order of the Public Utilities Commission of the State of Kansas, which has heretofore been enjoined.

Respectfully submitted,

J. M. CHALLISS,

Attorney and Solicitor for The Atchison
Railway, Light & Power Company,

Appellee.

W. P. WAGGENER,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, the undersigned, as counsel for The Atchison Railway,
Light & Power Company, appellee, in the above entitled cause,

hereby certify to this Honorable Court, that in my judgment the within petition for a modification of the opinion and decree of this court, or for a re-hearing, is well founded in fact and law, and that the same is not interposed for delay.

J. M. CHALLISS,
Solicitor for The Atchison Railway,
Light & Power Company, Appellee.

